IN THE SUPREME COURT OF MISSOURI

SC 92573

JOHN PRENTZLER,

Respondent,

vs.

ROBIN CARNAHAN, et al.,

Appellants,

and

MISSOURIANS FOR RESPONSIBLE LENDING, et al.,

Appellants.

On Appeal from the Circuit Court of Cole County
Honorable Judge Daniel R. Green

BRIEF OF RESPONDENT PRENTZLER

June 15, 2012

Respectfully Submitted by:

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STATEMENT OF FACTS

A. Initiative Petition 2012-066

James J. Bryan submitted a sample sheet for an initiative petition proposing Anti-Payday Lender amendments to Chapters 367 and 408, RSMo, on July 7, 2011. (L.F. 26-30). Intervenor-Appellant Missourians for Responsible Lending ("MRL") claims to state the purpose therein:

> [T]o prevent lenders, such as those who make what are commonly known as payday loans, car title loans, and installment loans, which have typically carried triple digit interest rates as high as three hundred percent annual or higher, from charging excessive fees and interest rates that can lead families into a cycle of debt by…
>
> (1) Reducing the annual percentage rate for payday, title, installment and other high cost consumer credit and small loans from triple-digit interest rates to thirty-six percent per year;
>
> (2) Extending to veterans and others the same thirty-six percent rate limit… and
>
> (3) Preserving fair lending by prohibiting lenders from structuring other transactions to avoid the rate limit through subterfuge.

(L.F. 28; MRL Br. 7-8).

The proposed summary statement of Appellant MRL and Bryan ("Intervenor-Appellants," or collectively, "MRL") followed this same outline, asking first whether "Missouri law [should] be amended to: (1) Reduce the annual interest rate for payday,

title, installment, and other high cost consumer credit and small loans from triple-digit interest rates to 36%?" L.F. 172. MRL admits that one reason they proposed to "reduce the annual interest rate…to 36%" is their dissatisfaction with the current statutory limit of interest and fee charges of 75% of principal for payday loans. *See* MRL Br. 6-7 (citing § 408.505.3, RSMo).

B. The Secretary of State's Summary Statement

The Secretary of State prepared a summary statement to be included in the official ballot title. The Secretary's original summary statement reads:

> Shall Missouri law be amended to limit the annual rate of interest, fees, and finance charges for payday, title, installment, and consumer credit loans and prohibit such lenders from using other transactions to avoid the rate limit?

L.F. 32. The proposed summary statement was submitted to and approved by the Attorney General. L.F. 50.

C. The Auditor's Fiscal Note & Fiscal Note Summary

1. The Auditor's "Normal" Procedures In Preparing Fiscal Notes and Fiscal Note Summaries

The Auditor's normal policy in preparing a fiscal note is to send copies of the proposed measure to state and local governmental entities requesting information regarding the entities' estimated costs or savings for the proposed measure. Section 116.175, RSMo, states that proponents or opponents *may* submit a proposed statement of fiscal impact to the Auditor within ten days of the Auditor's receipt of the proposed measure from the Secretary. § 116.175.1, RSMo. The Auditor never posts fiscal note

requests, and because his office only recognizes submissions "in terms of a proponent or opponent," neither "solicits" nor "takes" "public comments" on proposed fiscal notes. 3/27/12 Tr. 17:1-10.

Despite the Auditor's enforcement of Section 116.175's requirement that only an avowed "proponent" or "opponent" may make a proposed fiscal impact submission to him, the Auditor's corporate representative, Jon Halwes, ignores the ten-day deadline found in the same statute. Ex. 9 at 15. He has further admitted he does not review proponents or opponents submissions of statements of fiscal impact to ensure they comply with GASB standards as required by Section 116.175, RSMo. Ex. 9 at 15. In addition, he does not rely on or follow 15 CSR 50-5.010, the Auditor's promulgated regulation that purportedly governs submission of proposed statements of fiscal impact. Ex. 9 at 15.

The Auditor normally reviews the submissions of state and local governmental entities, along with the submission of proponents and opponents of the proposed measure for completeness and reasonableness. Joint Stipulation "JS" 6. The Auditor's review for completeness ensures the entity sent what it intended, and is reasonably related to the proposal and fiscal impact the entity suggested. JS 6. The Auditor may follow up with that questions to the entity. JS 6. If the Auditor finds a response unreasonable, that affects the weight given to that response in the fiscal note summary. JS 6. The Auditor does not review submissions to ensure they meet statutory requirements. Ex. 9. In creating fiscal notes, the Auditor includes submissions verbatim, if possible, making as

few changes as possible. JS 6. The Auditor normally takes into account all submissions and draft the fiscal note summary based upon the fiscal note. JS 6.

The fiscal note and summary are prepared by a single individual in the Auditor's office, and are not substantively reviewed by anyone else. 3/27/12 Tr. 15:17-24. No matter what responses he receives, the Auditor includes them in the fiscal note, even if the responses are contradictory, irrelevant or nonsensical. Tr. 21:9-22. Mr. Halwes is unaware of why the Auditor's office long ago decided to simply paste submitters' responses into the fiscal note verbatim, "no matter what they say." Tr. 21:4-25.

Mr. Halwes uses his own subjective judgment in deciding whether to follow up on a response. *See* 3/27/12 Tr. 74:20-75:13. This process "does not at any point require the Auditor to summarize or explain his analysis," (State Br. 33), and does not even require the Auditor to perform "his own independent analysis" at all. State Br. 40. *See also* Tr. 95:16-20 (Mr. Halwes did not do "any independent analysis" in preparing "the actual wording for the fiscal note summary."). Instead, Mr. Halwes simply decides to "summarize" the points he "believe[s] are important for the public." Tr. 84:11-13.

2. Preparation of the Fiscal Note and Fiscal Note Summary for the Anti-Payday Lender Initiative Petition

The proposed measure was sent to all state governmental entities in the Auditor's file. *See* L.F. 34; Ex. 10. It was not sent to all local governmental entities (*see* L.F. 34; Ex. 10) and the Auditor used discretion to decide who received it. 3/27/12 Tr. 18. Only six of the sixteen local governmental entities responded to the Auditor. Tr. 165:25-166:6.

Dr. Joseph Haslag submitted a proposed statement of fiscal impact to the Auditor as an "opponent." L.F. 37-46; Ex. 7. No statement of proposed fiscal impact was submitted by James J. Bryan, or any other proponent. *See* L.F. 34-47; Jt. Ex. 3.

3. Dr. Haslag's Submission to the Auditor and the Division of Finance Response

On July 18, 2011, Dr. Joseph Haslag submitted his proposed statement under Section 116.175, RSMo. L.F. 37-46. Dr. Haslag's submission suggested that as a result of the proposed measure, payday (and title) loan stores would close and there would be substantial costs to both state and local government entities. *Id.*. Dr. Haslag opined that there would be decreases in Missouri gross domestic product, Missouri general revenues, and both state and local licensing fees collected. L.F. 37. Dr. Haslag also indicated there would be costs to the state as a result of increased unemployment insurance benefits. *Id.* Dr. Haslag estimated total costs as a result of the proposed measure (based on closure of payday and title lending stores) would be $13.65 million in Year 1 and $3.6 million in Year 2. Attached to Dr. Haslag's report was also an analysis from the Division of Finance. L.F. 46.

The Division of Finance suggested the inititative would put payday and title lenders out of business. *Id.* The response also indicated that the initiative would put half of the "510 lenders" out of business, estimating the loss in revenue for all three groups at $675,000. *Id.* Finally, the response indicated that the Division would need to "decrease...consumer credit examination staff by 4 of 5 examiners." *Id.*

Jon Halwes, the Auditor's representative and fiscal note preparer, found Dr. Haslag's analysis to be reasonably complete and accurate. 3/27/12 Tr. 24:19-25:7. Dr. Haslag's submission was included in the fiscal note essentially verbatim. Tr. 24:13-15. Halwes recognized that there were internal conflicts in the fiscal note, largely due to differences in assumptions made by the entities. Tr. 29:13-31:6. Halwes stated he believes that Dr. Haslag's assumptions, specifically that the proposed measure would cause businesses to close, was the correct assumption. *Id*. Halwes relied heavily on Dr. Haslag's analysis in preparing the fiscal note summary. Tr. 32:16-20. Halwes agreed that Dr. Haslag's analysis did not address the fiscal impact on "510 lenders," and conceded that he did not do any independent analysis to determine such impact. Tr. 36:1-9.

4. Department of Insurance, Financial Institutions and Professional Registration (DIFP)'s Response to the Auditor

The Missouri Department of Insurance, Financial Institutions and Professional Registration (DIFP) is the parent organization of the Division of Finance. Despite the Division of Finance's analysis regarding the significant costs of the proposed measure, DIFP submitted the following response to the Auditor:

> [The Initiative Petition] will have no cost or savings to the department. If the adoption of the measure results in a reduction of fee revenue from consumer credit entities, the department anticipates it would expend a correspondingly smaller amount to regulate these entities.

L.F. 35.

Despite its apparent conflict with the response from the Division of Finance attached to Dr. Haslag's submission, Halwes made no effort to clarify the issue. 3/27/12 Tr. 26:7-29:1. Halwes first suggested that the DIFP response and Division of Finance response were consistent, *i.e.*, the DIFP response included or incorporated the Division's response. *Id.* However, Halwes admitted that he never confirmed this theory by calling DIFP or reviewing their work, and that his theory was entirely speculation. *Id.*

The Auditor's staff had a working relationship DIFP, as it has with all agencies. 3/27/12 Tr. 77:25-79:6. At trial, Mr. Halwes admitted that he merely spoke with an agency employee, Grady Martin, about how a private party was able to sunshine its internal communications, but he made no effort to follow up on the Division of Finance analysis or ask it if was true. Tr. 62:8-63:19. Indeed, Mr. Halwes admitted that he performed no independent analysis whatsoever. Tr. 36:1-9.

5. The Auditor's Fiscal Note Summary

The Auditor's fiscal note summary for the proposed ballot measure states:

> State governmental entities could have annual lost revenue estimated at $2.5 to $3.5 million that could be partially offset by expenditure reductions for monitoring industry compliance. Local governmental entities could have unknown total lost revenue related to business license or other business operating fees if the proposal results in business closures.

L.F. 33.

Halwes testified that in preparing the fiscal note summary, he summarizes the points that he believes are important for the public. 3/27/12 Tr. 84:11-13. The estimated

range of annual lost revenue in the first sentence was taken by Halwes from Dr. Haslag's numbers. Tr. 38. With respect to local government entities, the fiscal note summary states the impact is "unknown." L.F. 33. No local government entities indicated the fiscal impact of the proposed measure would be "unknown." Tr. 52:11-20. Dr. Haslag's submission included estimated losses to certain local government entities. Tr. 52:21-25.

D. Pre-Trial Intervention Failure

In September 2011, Appellants Shull and Stockman (collectively, "Shull") moved to intervene as of right or, in the alternative, permissively, in the *Prentzler* and *Reuter* cases. L.F. 2; 73-77. Shull failed to move to intervene in the *Northcott* or *Francis* cases until months later, and without citation to the record, claim that they did not believe "the industry" would have filed "two more suits." Shull Br. 16-17, footnote 13. Shull does not explain which of the affected lenders' industries they meant to reference, or cite any record evidence that an "industry," rather than the individual plaintiffs, actually filed the lawsuits. *Id.*

Respondent Prentzler initially opposed Shull's motion, but because Shull claimed to have an interest arising from their own Section 116.190 challenge to the Auditor's fiscal note, dropped his opposition. L.F. 73-74 (Shull's Motion to Intervene argued that their own fiscal note challenge, which they dismissed after being allowed into the *Prentzler* case, provided them with an "interest" for purposes of intervention). In *Reuter v. Carnahan et al.*, the Circuit Court stated that it was inclined to allow Shull to intervene after a December 12, 2011, argument. 12/12/11 Tr. 12. Throughout this period, Shull

engaged in several abortive attempts to introduce evidence on their motions to intervene in *Northcott* and *Francis*. Shull Br. 19.

Throughout this time, Prentzler was attempting to learn from Shull the claims, defenses, facts, or theories they intended to rely on at trial. Shull did not (and never did, through amendment or supplement) plead a unique claim or defense in their Answer (*Compare* Shull and Stockman's Answer, L.F. 78-82, to Answer of Carnahan, L.F. 83-89, and Answer of Schweich, L.F. 90-96, which are more thorough and assert additional defenses neglected by Shull and Stockman). From October 2011 through January 2012, a period of several months, Shull failed to notice any depositions—even the deposition of Dr. Haslag, who had submitted the fiscal impact statement to the Auditor as an opponent of the initiative. L.F. 1-9 (Docket sheet in *Prentzler* covering a several-month period, which shows Shull served no notice of deposition for Dr. Haslag even when trial was only weeks away).

Mirroring their conduct in discovery, Shull refused to tell the Circuit Court at its climactic January 30, 2012 hearing on intervention what additional claims, defenses, arguments, or facts they would try to establish at trial. 1/30/12 Tr. 12-17. Instead, Shull deposited affidavits with the Court claiming that their petition signatures established a constitutional interest in ensuring the petition was circulated without change and then rendered valid by the Secretary of State. *See generally* Shull Br. 20-21.

After Shull was unable to articulate any additional claim, defense, argument, point of proof, or fact that they would argue at trial, the Circuit Court stated that it would not grant intervention in *Northcott* or *Francis*, and would reverse its earlier rulings allowing

intervention in *Prentzler* and *Reuter*, but would allow Shull to brief and orally argue the case as amicus. 1/30/12 Tr. 15-17. While drafting the Circuit Court's order, Shull never moved for leave to amend their Answer to plead additional claims, defenses, or ultimate facts that they intended to prove at trial, and never moved the Circuit Court to reconsider its decision on the grounds that it actually had unique claims, defenses, or factual arguments to raise. Instead, Shull took an interlocutory appeal to the Court of Appeals on the issue of permissive intervention.

In the Court of Appeals, Shull argued that the Circuit Court had correctly decided that they had a "personal interest" in the Section 116.190 litigation as political supporters of the petition, but had incorrectly decided that the State Defendants would adequately represent that interest. *See Prentzler v. Carnahan*, __S.W.3d__ 2012 WL 985839 (Mo. App. W.D. Mar. 26, 2012) (no transfer or rehearing applied for or taken). The parties in *Prentzler v. Carnahan* were the same as those in this case, as it was merely an interlocutory appeal arising from the same proceeding that is now before this Court. *Id.*

On March 26, 2012, the Court of Appeals affirmed the Circuit Court and rejected Shull's position, and because Shull failed to seek reconsideration or transfer, a mandate issued. L.F. 132.

The Court of Appeals recognized Shull's argument—identical to the one they assert in their brief—that "as signatories and supporters of the Consumer Credit Initiative Petition, they have a personal interest in the validity of the initiative petition, in seeing [it] circulated and qualified for the November 2012 ballot, and in having their signatures counted as valid." *Prentzler*, 2012 WL 985389 *3. *Compare* Shull Br. 30 (using almost

identical language to describe their "personal interest"). After considering this argument, the Court of Appeals held that "Appellants have failed to establish that, as mere supporters and signatories of an initiative petition, they have a sufficient interest in the underlying § 116.190 actions." *Id*. The Court noted that Section 116.190 actions have a limited purpose, and that accordingly, "Appellants' proposed interests in having their signatures count and qualifying the initiative for the ballot are not at issue in the underlying litigation." *Id*. at *3-4.

The Court further noted that:

> Appellants have failed to show any such immediate or direct claim in the underlying Industry Suits, as they have not established how the outcome of those cases will cause them to incur any legal liability or directly affect their legal rights as supporters of the Consumer Credit Initiative Petition. Thus, it becomes inconsequential whether the State defendants adequately represent the interests of Appellants, as they have failed to establish that they have a sufficient interest in the outcome of the underlying litigation by merely signing and supporting an initiative petition.

Id. at *5.

The Court "note[d] that the trial court stated that a 'citizen of this State who has differing political views…does have an interest in litigation concerning the Initiative.'" *Prentzler*, 2012 WL 985389 at *5. However, it concluded that "opening intervention of right to citizens solely because they have a differing political view as to the ballot

initiative would open the floodgates to oppressive intervention, and no public policy would be served."

Id. at *6. Shull left these findings undisturbed.

The record of the trial court and Court of Appeals disclosed no point at which Shull reversed course from Appellants' pleadings and discovery and articulated any claim, defense, point of proof, or factual argument that they intended to establish or prove at trial. Although Shull attempted to stay the trial, and it was delayed over Prentzler's objection at the request of the Defendants, the record establishes no point at which Shull informed the Circuit Court of claims, defenses, points of proof, or factual argument which they had decided to raise and which would not be raised by the State Defendants.

Trial was held on March 27, 2012. As *amici*, Shull had every opportunity to make legal arguments, and actually proffered oral argument and briefing on all of the issues, both legal and factual. Tr. 250-255. During this time, Shull neither proffered, nor identified, nor referenced any other facts or factual arguments they would have made through independent witnesses or through cross-examination. *Id*.

Shull now claims that they would have submitted evidence that would have challenged the core assumptions of the fiscal note itself, arguing that a positive fiscal impact could be expected by capping rates at 36% and shutting down several lending industries. Shull Br. 33-35. Shull actually filed such a challenge under Section 116.190 and used its existence as an excuse to intervene in the *Prentzler* case, but then voluntarily dismissed their own challenge. L.F. 73-74. In *Prentzler*, Shull never pled any claim or defense that the fiscal note or summary actually understated the positive impact of the

petition. L.F. 78-82. Shull's Supreme Court brief is the first time they have raised their new theories about how the 36% interest rate would actually lead to a positive fiscal note.

E. Ballot Title Litigation

1. Procedural Background

The Secretary certified the official ballot title, which included the Secretary's Summary Statement and the Auditor's Fiscal Note Summary on August 9, 2011. L.F. 49. Respondent Prentzler filed his lawsuit challenging the official ballot title for Initiative Petition on August 18, 2011 L.F. 1, 10-72. Three other lawsuits were also filed challenging the official ballot title. *See* L.F. 5.

2. March 27, 2012 Trial

The trial court tried the cases in a single hearing and on a common record. L.F. 5. The parties entered a Joint Stipulation. 3/27/12 Tr. 7. The Joint Stipulation described facts relating to the preparation of the summary statement, fiscal note and fiscal note summary. The parties also offered four joint exhibits: the sample Initiative Petition (Jt. Ex. 1), the letter from the State Auditor to the Secretary of State regarding Attorney General approval of the fiscal note summary (Jt. Ex. 2), the Fiscal Note (Jt. Ex. 3), and the Certification of the Official Ballot Title (Jt. Ex. 4).

The Court heard testimony from two experts, Dr. Joseph H. Haslag and Dr. Thomas A. Durkin. Dr. Haslag's analysis considered only title and payday lenders; Dr. Durkin's analysis also considered installment ("510") lenders. Dr. Haslag's economic analysis was undisputed by the Auditor.

a. Payday and Title Lenders

Dr. Haslag used two different methods to conclude that a 36% cap would put all payday (and title) lenders out of business. First, he researched the internal costs of payday lenders. He calculated the amount of interest that lenders would need to earn in order to stay in business and, using a widely-accepted formula, determined that a 36% APR would not come close to covering payday lenders' variable costs. This would force rational lenders to immediately shut down or to go bankrupt. 3/27/12 Tr. 125-26; *see* Jt. Ex. 3; Ex. 7. Second, Dr. Haslag verified his calculations by researching the effects of 36% caps in other states and found that in fact, payday lenders had been forced out of business. Based on an internal Missouri Division of Finance email, he concluded that the same results would apply to title lenders. *See* Jt. Ex. 3; Ex. 7. Mr. Halwes testified that the Auditor independently investigated those conclusions and accepted them as reasonable, complete and accurate. Tr. 24:19-25:7. Dr. Durkin also testified that this analysis was reasonable. Tr. 195:8-10.

Dr. Haslag next calculated the state GDP contributed by payday and title lenders, which he had reported would be lost if these industries were eliminated. 3/27/12 Tr. 126:23-127:23. Dr. Haslag calculated the value of the credit provided by payday and title lenders, which, economically, is equal to the amount that lenders receive, and the amount that borrowers pay, for the credit. L.F. 41. This totaled $78.46 million in Year 1 and $79.13 million in Year 2. L.F. 45, Table B, row 1; Tr. 146. On cross examination, Dr. Haslag testified that capital had flowed into this industry because it is the best use of that capital, and that it could not be assumed that in fiscal Year 1 or 2, there were other

Missouri industries with equal rates of return into which the capital would be reinvested. Tr. 132. Mr. Halwes admitted that the Auditor accepted these conclusions as reasonable and Dr. Durkin's testimony was the same. Tr. 24-25, 195.

Then, Dr. Haslag converted the lost GDP into lost tax revenues. Dr. Haslag testified that economists commonly use a figure of 3.8% to determine the total state tax revenues derived from a dollar of state GDP. 3/27/12 Tr. 128:3-23. Dr. Haslag testified that he had recently used this method to prepare an expert opinion on the fiscal value of the University of Missouri System to the state. Tr. 128:24-129:16. Dr. Haslag concluded that the combined losses from the payday and title industries alone (not including "510 lenders") equaled $2.98 million in Year 1 and $3.01 million in Year 2. L.F. 45, Table B, row 2. Mr. Halwes admitted that the Auditor accepted these conclusions as reasonable and Dr. Durkin's testimony was the same. Tr. 24-25, 195.

Dr. Haslag next calculated the expected loss to the state unemployment compensation fund. First, Dr. Haslag determined the number of payday and title lender employees who would be affected. 3/27/12 Tr. 130:23-132:6. He then multiplied this by their expected benefits to reach a total of $8.04 million for payday and $10.08 million for payday and title combined. *Id.*; *see also* L.F. 45,Table A and B, row 3). Mr. Halwes admitted that he found the numbers to be reasonable, but testified that he refused to include or mention them in the fiscal note summary because the unemployment compensation fund is not paid from the general revenue fund. Tr. 45:3-46:17.

Dr. Haslag testified that the general revenue fund is replenished by taxing businesses, and that assuming that payday and title loan companies left the state, other companies would have to replenish the fund. 3/27/12 Tr. 130:23-135:3. Further, Dr. Haslag testified that this would itself have a fiscal impact, as corporate income would decrease by the amount of increased payments to the fund. Tr. 134:11-135:3. Further, Missouri has borrowed money to keep the fund solvent, and interest payments will have to be made to the federal government. Tr. 133:11-24. No witness disputed that in fact, there will be a fiscal impact from increased unemployment compensation payouts.

Dr. Haslag also calculated lost license fee revenue to the state using the Division of Finance's internal email and data. L.F. 45. He determined that lost license fees totaled $.59 million. L.F. 45, Table B, row 4. He relied upon the Division of Finance's internal email indicating that the measure "would have a significant fiscal impact" because of license fee losses, even after staff was decreased by "4 or 5 examiners." L.F. 46. Mr. Halwes did not dispute these figures or this method. However, he testified that he considered the report of the parent agency of the Division of Finance, the Department of Insurance, Financial Institutions, and Professional Registration ("DIFP"), which found "no cost or savings" because the lost revenue would be offset by lower expenses of regulation. 3/27/12 Tr. 26:25-29:1.

Dr. Haslag testified, in turn, that there was no data to support DIFP's disagreement with the Division of Finance. 3/27/12 Tr. 140:16-144:7. In fact, Dr. Haslag testified that it took him only a few moments to calculate that even firing five of the highest-paid employees would not save enough in salary or benefits to come even close to covering

the Division's lost revenue. *Id*. Mr. Halwes could only answer that he did not try to obtain this information from DIFP, and his theory was of the lost revenue being offset was mere speculation. Tr. 26:25-29:1. Even if, as Mr. Halwes suggested, the entire amount of license revenue losses ($.59 million) could be offset by costs, and therefore offset against the lowest amount of payday and title revenue losses calculated by Dr. Haslag (roughly $3.6 million, the sum of rows 2 and 4 in column 1 of Table B at L.F. 45), the total lost revenues could be no lower than roughly $3 million. Tr. 145. Nonetheless, the summary claims that revenue losses as low as $2.5 million might still be offset by cost reductions. L.F. 33.

b. "510 Lenders"

Dr. Durkin opined and testified-without opposition-that the 510 industry would shut down. 3/27/12 Tr. 188:6-8; Ex. 14. The loss of these loans, which are primarily used to finance consumer purchases, would have the following effects: reduce state sales tax revenues in Year 1 and 2 by $5.44 million; reduce income tax revenues by $1.2 million in Year 1; reduce state sales tax revenues from former employees due to belt tightening by $.845 million; increase unemployment compensation by $6.6 million (using Dr. Haslag's methodology); and reduce business income tax revenues by $.504 million. Tr. 189:11-197:14. This would lead to a total Year 1 impact of $14.589 million and a Year 2 impact of $5.944 million. Ex. 14. Based on the calculations of Drs. Haslag and Durkin, total loss to all three industries-payday, title, and installment-was estimated at over $28 million. Tr. 196:23-197:3.

c. "Local Impact"

There was significant evidence at trial regarding the local impact of the proposed measure. Evidence was presented reflecting that there would be significant losses to local government entities based on: loss of license fee revenue, loss of earnings tax revenue, loss of sales tax revenue. Halwes testified, "from Mr. Haslag's information, it was clear...that there would be a local impact." 3/27/12 Tr. 90:15-22. Dr. Haslag testified that local political subdivisions would have losses of at least $122,000 based on a sampling of two cities that would lose license fee revenue. Tr. 147:5-21.

Dr. Haslag testified that his calculations were only for state-level losses, but that business closures would have similar negative fiscal impacts on local government entities. 3/27/12 Tr. 151-153. Mr. Halwes testified he understood that Haslag's analysis included losses related to both state income tax and state sales tax. Tr. 86:6-13. He also testified he was aware that at least two cities levied a local earnings (income) tax, and neither the fiscal note or fiscal note summary included this local impact. Tr. 53:20-54:2, 73:13-22.

Mr. Halwes admitted that if, as he accepted as true, there would be lost GDP as a result of the proposed measure, there would also be lost state sales tax revenue. 3/27/12 Tr. 63:24-64:5. Dr. Durkin testified that there would be parallel losses in local sales tax revenue. Tr. 199-200. Halwes confirmed that there would be a "corresponding impact for local government sales tax revenue." Tr. 69:3-7. Halwes admitted that the fiscal note and fiscal note summary contained no "local impact" based on loss of local sales tax revenue. Tr. 69.

The Auditor's opposition as to the facts, specifically as to calculations by Drs. Haslag and Durkin, was minimal. Mr. Halwes accepted all of Dr. Haslag's calculations, disagreeing only on the issue of whether unemployment compensation payments constitute a fiscal impact to the state. Mr. Halwes admitted that his fiscal note and summary contained no analysis whatsoever of "510" lenders or local impact, and admitted that the fiscal impact would have to increase once "510" lender and local impacts were added to the note. 3/27/12 Tr. 62; 69. In his testimony, Dr. Haslag concurred. Tr. 152-53.

F. Judgment of the Trial Court

The trial court issued a single judgment in all four cases, which was subsequently amended. L.F. 202-209. With respect to the summary statement, the court found the Secretary's summary "insufficient, unfair and likely to deceive voters." L.F. 204. The court determined that the exact percentage of the interest rate cap was "required in order for the signers of the initiative and voters to understand the purposes of the Initiative." L.F. 205. The court certified a new summary statement as follows:

> Shall Missouri law be amended to allow annual rates up to a limit of 36% including interest, fees, and finance charges for payday, title, installment, and consumer credit loans and prohibit such lenders from using other transactions to avoid the rate limit?

L.F. 207.

With respect to the fiscal note and fiscal note summary, the court found both to be inadequate and unfair, remanding them to the Auditor for preparation of a new fiscal note

and fiscal note summary. L.F. 206. The court found the fact that the measure would cause many businesses to close "undisputed." L.F. 207. The court also noted the fact that Dr. Haslag's analysis did not include other types of lenders (in addition to payday and title lenders) that would be impacted by the initiative. L.F. 207. The court explained that the Fiscal Note itself acknowledged that "510 lenders" would be negatively impacted by the proposed measure. L.F. 207. The court noted that the Auditor admitted that the *fiscal note and fiscal note summary* contained no analysis of "510 lenders" *or local impact* and therefore held the fiscal note and fiscal note summary "insufficiently, unfairly, and significantly underestimate[d] the fiscal impact of the initiative." L.F. 207-208.

Finally, the court specifically found that Plaintiffs Francis and Hoover's constitutional claims were unripe, and that all other claims of the Plaintiffs not specifically addressed in the judgment were found in favor of Defendants. L.F. 209.

G. Post-Trial Intervention

Intervenor-Appellants Rev. James J. Bryan and Missourians for Responsible Lending (MRL) moved to intervene following the trial on April 9, 2012. (LF 146-196). Judge Green granted their intervention. (4/10/12 Tr. 42). Bryan and MRL also filed a motion to stay and/or vacate, which was subsequently denied by the trial court. (*See* L.F. 8; 210-215).

H. Signatures

Intervenor-Appellants inappropriately suggest to the court that they have submitted enough signatures to meet the constitutional minimum needed to qualify for the ballot. Evidence of such is not in the record, not before this Court, and irrelevant to

the issues before this court. The Secretary of State has not yet certified *any* valid signatures for Initiative Petition 2012-066. Even if she had certified a certain number of valid signatures, this fact was irrelevant to the trial court's analysis and is irrelevant to this court's analysis. Section 116.190, RSMo, review does not in any way concern signatures, only the questions of whether the ballot title, fiscal note and fiscal note summary are insufficient and unfair, which the trial court answered in the affirmative in its judgment on April 7, 2012. Intervenor-Appellants did not submit signatures to the Secretary of State, until May 6, 2012, approximately one month after the trial court's Second Amended final Judgment. This post-trial, *political* fact was not before the trial court and is irrelevant to the issues before this Court.

SUMMARY OF ARGUMENT

Given the burgeoning number of initiatives and the limited analysis the Auditor and Secretary of State admittedly devote to preparing ballot titles, it was perhaps inevitable that eventually, facts like these, and a case like this, would come before this Court. The trial court's factual findings make clear that the 2012 cycle has witnessed a new level of ballot title "insufficiency" and "unfairness." It should be remembered as the high-water mark. By affirming, this Court would provide needed guidance for lower courts and draw a clear line of accountability for the official guardians of the initiative process.

Appellants' arguments have grown more novel (and longer) on appeal, but at bottom, in order to affirm the trial court, this Court only needs to find two things. First, a petition whose purpose is to "reduce" to 36% the rates allowed under current limits

cannot be fairly summarized in 100 words without including the "36%," and cannot misrepresent that the law would be "amended" to impose some unspecified "limit" when a limit already exists. *See* Points VI-VIII, *infra*. Second, a fiscal note and summary that completely fails to account for the fiscal impact arising from an entire industry (510 lenders) and an entire public sector (local governments) is unfair and insufficient. *See* Points II-V.

Indeed, the trial court's fiscal note decision *must be affirmed* because no Appellant appealed the "local impact" issue, a sufficient and independent basis for the court's order of remand. *See* Point I. Finally, Appellant Shull and Stockman's own briefing provides the best demonstration of why their appeal is barred by collateral estoppel and the trial court wisely denied permissive intervention. *See* Point IX, *infra*. The trial court's judgment should be affirmed.

ARGUMENT

I. APPELLANTS HAVE ABANDONED THEIR APPEAL ON FISCAL NOTE ISSUES

The trial court found that the fiscal note and fiscal note summary were insufficient and unfair by understating the impact of the proposed measure for two reasons: (1) the failure of the State Auditor to calculate the impact to the state of proposed measure upon 510 Lenders; *and* (2) the failure of the Auditor to calculate and state the local impact of the proposed measure. The State and the MRL raise allegations of error only on the first basis (510 lenders). No Appellant has alleged that the trial court's Final Judgment is in error with respect to its second basis: local impact.

Rule 84.13 states the requirements for an Appellant to preserve error and raise it before an appellate court in a civil appeal.

> Apart from questions of jurisdiction of the trial court over the subject matter and questions as to the sufficiency of pleadings to state a claim upon which relief can be granted or a legal defense to a claim, *allegations of error not briefed or not properly briefed shall not be considered in any civil appeal...*

Rule 84.13(a) (emphasis added). In their briefs, Appellants make no argument that the fiscal note and fiscal note summary *do* properly include the local impact of the proposed measure. The State's Brief reads, "The *only* issue is adequacy (or sufficiency of the fiscal note due to the supposed lack of analysis on the issue of fiscal impact on the 510 lenders.)" State Br. 18 (emphasis added). Since "local impact" is a separately stated and individually identified basis of the judgment and is not argued in any Appellant's brief, it is deemed abandoned by Appellants and cannot be considered by this Court.

This abandonment is crucial in this case. Under Section 116.190, the sole and exclusive remedy is remand to the State Auditor for a new fiscal note and summary. § 116.190.4, RSMo. Even if Appellants are correct that the 510 lender issue is not a sufficient basis for the trial court's determination of insufficiency and unfairness, they have abandoned the local impact basis of the Final Judgment. Thus, even if Appellants succeed on the one ground they have raised, the fiscal note and fiscal note summary are still insufficient and unfair on the basis that they

contained no analysis of local impact, and must be remanded to the State Auditor for a new fiscal note and a new fiscal note summary.

Regardless of any determination of any other factor on appeal related to the fiscal note and fiscal note summary, Appellants cannot overcome their abandonment of any claim of error regarding the local impact issue. With respect to the trial court's Final Judgment on the fiscal note and fiscal note summary, Appellants' appeal should be dismissed or this Court should affirm the trial court's judgment finding the fiscal note and fiscal note summary insufficient and unfair and remanding the same to the State Auditor under Section 116.190, RSMo.

The Court of Appeals has held that Rule 84.04 requires this very approach when Appellants do not challenge all the bases for a trial court's judgment on appeal. In *Arch Insurance Company v. Progressive Casualty Insurance, Inc.*, 294 S.W.3d 520 (Mo. App. W.D. 2009), the appeal did not raise error with all the bases for the underlying judgment. The Court noted:

> While it may not be stated explicitly in Rule 84.04, the fundamental requirement for an appellate argument is that it demonstrate the erroneousness of the basis upon which a lower court or agency issued an adverse ruling.

Id. at 524 (quoting *Rainey v. SSPS, Inc.*, 259 S.W.3d 603, 606 (Mo. App. W.D. 2008)). "Because of the patent deficiencies in Arch's Points Relied On and Argument," the Court dismissed Arch's appeal. *Id. See also Rainey*, 259 S.W.3d. at 606; *Waller v Shippey*, 251 S.W.3d. 403, 406, n.5 (Mo. App. W.D. 2008).

This Court has similarly ruled that not attacking a particular part of a judgment results in that part of the judgment being affirmed. *Ellis v. Farmer*, 287 S.W.2d 840, 852 (Mo. 1956). The Western District expounded on this sound statement of law:

> On appeal, the Brownings [Appellants] do not challenge the court's nuisance finding but instead limit their argument to zoning and affirmative defense issues. The absence of appellate argument on the nuisance issue suggests the Brownings have conceded and abandoned this point. The Court need not consider points not raised in appellants brief...Moreover, this court may affirm the judgment on the nuisance issue alone since, "the judgment of the trial court must be affirmed if it is correct on any theory"...The Brownings' failure to argue the nuisance issue leaves that issue as an independent basis for affirmance.

City of Lee's Summit v. Browning, 722 S.W.2d 114, 115 (Mo. App. W.D. 1986) (internal citations omitted).

Here, both the State and MRL Appellants failed to challenge the trial court's decision that the fiscal note and summary contained no analysis of local impact and that the stated "costs" in the fiscal note and summary would have to increase if local impact were added to the note. L.F. 207. In failing to challenge this point, their appeal of the portion of the Final Judgment declaring the fiscal note and fiscal note summary insufficient and unfair and remanding the same to

the State Auditor must be dismissed. If not dismissed by this court, then the decision of the trial court on the insufficiency and unfairness of the fiscal note and fiscal note summary should be affirmed.

II. THE TRIAL COURT DID NOT ERR IN CONSIDERING THE EVIDENCE OF FISCAL IMPACT PRESENTED AT TRIAL IN THAT CITIZEN/PLAINTIFFS MUST HAVE A FORUM TO MAKE A FULL EVIDENTIARY RECORD ON INSUFFICIENCY AND UNFAIRNESS BECAUSE SECTION 116.190 EXPRESSLY PROVIDES FOR SUCH A RECORD AND NOTHING IN THE CONSTITUTION, LAWS, OR PUBLIC POLICY REQUIRES PRIOR SUBMISSION OF EVIDENCE TO THE AUDITOR (RESPONDS TO STATE'S POINT III AND MRL POINT II.B)

The State and MRL claim that in ensuring the integrity of ballot titles in Section 116.190 challenges, the trial court must deny the right of citizen-plaintiffs to put on evidence of fiscal impact if that same evidence was not placed in a submission by "proponents" or "opponents" before the 10-day deadline for them to comment under Section 116.175.1, RSMo. First, the State has failed to preserve its argument. Second, it is incorrect as a matter of law. The plain language of the statutes, sound policy, the integrity of the petition process, and the Missouri Constitution all counsel in favor of developing a full record in the circuit court. Some forum must exist in which citizens can ensure that the Auditor, who is

subject to no other oversight, prepares a fiscal note and summary that are at least "sufficient" and "fair."

A. Appellants Failed to Preserve This Issue By Timely Objecting at Trial

The State failed to preserve this issue for appeal by failing to object to such evidence at trial. The only objections made to Dr. Durkin's testimony were on the basis that his opinion lacked foundation and he was testifying on matters of law, which the court subsequently overruled. 3/27/12 Tr. 201:9-20. No objections were made on the basis that the evidence presented by Dr. Durkin at trial was improper or barred because it was not submitted to the Auditor under Section 116.175, RSMo. Such objection was waived by the Auditor at trial and was not properly preserved for appeal. As a result such arguments must be rejected as not properly before this Court. *See, e.g., Fleshner v. Pepose Vision Institute, P.C.*, 304 S.W.3d 81, 97 (Mo. banc 2010).

B. The Controlling Statutes Contain No Express or Implied Prohibition on the Circuit Court's Receipt or Consideration of Evidence of the Fiscal Impact of a Proposed Ballot Measure

The plain language of the statute is clear: "*Any* citizen who wishes to challenge the...fiscal note...may bring an action in the circuit court of Cole County." § 116.175.1, RSMo (emphasis added). The petition is only required to "state the reasons why the fiscal note or the fiscal note summary portion of the official ballot title is insufficient or unfair and...request a different fiscal note or

fiscal note summary [.]" The court is directed to "consider the petition [and] hear arguments." § 116.190.4, RSMo. This Court has consistently found that, in the absence of ambiguity, the plain language of a statute is controlling. *See, e.g.*, *Akins v. Dir. of Revenue*, 303 S.W.3d 563, 565 (Mo. banc 2010). No further analysis is necessary, as the plain language of Section 116.190, RSMo does *NOT* require pre-filing of comments with the State Auditor in order to maintain a suit challenging the fiscal note and fiscal note summary.

As discussed below, an even closer review of the plain language of the relevant fiscal note statutes—Sections 116.175 and 116.190—reaches the same conclusion. It reveals certain bedrock requirements and duties for the Auditor and for the Cole County Circuit Court. The process is simple and it is familiar. It follows a basic pattern that is part and parcel of our modern administrative state, and looks no different from any other transaction between the executive and judicial branch. First, the Auditor prepares the fiscal note. Second, the Circuit Court reviews the Auditor's work product under a specific statutory standard. The statutes spell out the details, and none of them limit the evidence the circuit court may consider in determining the sufficiency and fairness of a fiscal note or fiscal note summary.

1. The Auditor's Duties

The Auditor must comply with three core requirements that are mandatory and central to his function, along with several other procedural guidelines.

First, the Auditor "shall assess the fiscal impact of the proposed measure." § 116.175.1, RSMo. This means that regardless of the process used by the Auditor, his finished product must constitute an "assessment," it must address "fiscal impact," and it must relate to the "proposed measure."

Second, the Auditor "shall prepare a fiscal note and a fiscal note summary," and they "shall state the measure's estimated cost or savings, if any, to state and local governmental entities." § 116.175.2, RSMo. Again, regardless of the process the Auditor uses, his end product must meet these criteria: it must be a "fiscal note" and a "fiscal note summary," it must be a "statement" and an "estimate" of "costs or savings" (if any), and it must address state and local government entities.

Third, the Auditor's summary "shall summarize the fiscal note in language neither argumentative nor likely to create prejudice either for or against the proposed measure." § 116.175.3, RSMo. Relatedly, neither the summary nor the underlying fiscal note may be "insufficient" or "unfair." § 116.190.3, RSMo. This third requirement has engendered the most litigation, but the decisions agreed long ago that the ordinary meaning of these terms are that the summary and note cannot be (1) "inadequate; especially lacking adequate power, capacity, or competence" or (2) "marked by injustice, partiality, or deception." *See Missourians Against Human Cloning v. Carnahan*, 190 S.W.3d 451, 456 (Mo. App. W.D. 2006) (citing plain meaning of "insufficient" and "unfair").

The only other requirements are procedural: the fiscal note summary may not exceed fifty words, excluding articles (§ 116.175.3, RSMo); any proponents or opponents "may" submit a "proposed statement of fiscal impact" to the Auditor provided that they do so within ten days of the Auditor's receipt of the measure (§ 116.175.1, RSMo); the Auditor must finish his fiscal note and summary and send it to the Attorney General for approval within twenty days after receiving the petition (§ 116.175.2, RSMo); and the Attorney General has ten days to review and "approve the legal content and form" of the fiscal note summary (§ 116.175.4, RSMo). Finally, the Auditor "may consult with" state or local entities or "others with knowledge pertinent to the cost of the proposal." § 116.175.1, RSMo.

Nowhere do the statutes excuse the Auditor from rendering a sufficient or fair note or summary because no person qualifying as a "proponent" or "opponent" came forward to submit a qualifying "statement of fiscal impact" within ten days. Nor do the statutes excuse the Auditor from his duty to render a fair and sufficient statement of the fiscal impact of the measure, addressing both state and local entities, merely because he failed (or made little effort) to contact those with "pertinent" knowledge. While the statutes provide helpful guidance about the sources the Auditor might choose to mine, they do not make those contacts conditions precedent to his duty to comply with the three bedrock requirements of Sections 116.175 and 116.190. By the same token, of course, they do not allow the Auditor to dilute the requirements of his bedrock duties simply by "dumbing down" his inquiry and limiting his sources of information.

2. The Court's Duties

The statutes also clearly articulate the court's duty.

First, it must "place at the top of the civil docket" a suit filed by "any citizen who wishes to challenge the official ballot title or the fiscal note," so long as it is filed within ten days of the ballot title's certification by the Secretary of State. §§ 116.190.1, 116.190.4 RSMo.

Second, it "shall consider the petition, hear arguments, and in its decision, either certify the fiscal note or the fiscal note summary portion of the official ballot title to the secretary of state or remand the fiscal note or the fiscal note summary to the auditor for preparation of a new fiscal note or fiscal note summary…" § 116.190.4, RSMo.

Section 116.190, RSMo provides no restriction whatsoever on the circuit court's receipt of evidence or on the factual record litigants may provide for the court's consideration. Nor does the statute require the court to limit its review to the materials the Auditor bothered to find or chose to receive. In short, the controlling statutes contain no explicit or implicit requirement that the circuit court's review be artificially limited to the materials that land in the Auditor's lap.[1]

[1] MRL strains to "harmonize" Sections 116.175 and 116.190. MRL Br. 40-42. There is no need to "harmonize" statutes that apply to different things and are not in conflict.

3. The Absence of a Pre-Filing Requirement Was the Result of a Deliberate Legislative Choice that Should Not Be Reversed by this Court

The General Assembly, when enacting Section 116.190, RSMo, in 1980, could have written the statute to either bar opponents that did not submit statements of proposed fiscal impact to the Auditor from challenging the fiscal note, or to bar opponents from raising any issues or presenting any evidence that was not presented to the Auditor under Section 116.175, RSMo. It did not do so. The legislature could have added such provisions when Section 116.190 was amended in 1985, 1993, 1997, 1999, or 2003. Again, it did not. Even this year, several pieces of legislation making changes to this very section were before the legislature in the just concluded legislative session, but did not pass.[2] While the State and MRL feverishly argue that the law *should* exclude evidence not presented under Section 116.175.1 from Section 116.190 litigation, that argument *should* be made to the legislature, not the court. This Court holds that such policy decisions are best left to the general assembly. *First Bank v. Fischer & Frichtel, Inc.*, ___S.W.3d___, 2012 WL 1339437. *6 (Mo. banc 2012). While the State and MRL may desire to amendment it, the plain language of Section 116.190 is clear and neither requires fiscal note challengers to have submitted proposed statements

[2]*See* H.B. 1869, 96th Gen. Assembly, 2d Sess. (Feb. 29, 2012); S.B. 671, 96th General Assembly, 2d Sess. (Jan. 17, 2012).

of fiscal impact to the Auditor nor bars the court from hearing such evidence at trial.

Oregon's experience provides an instructive contrast. There, the legislature made the change that the State and MRL suggest. Before 1985, ORS 250.085 was very similar to Section 116.190, RSMo.; however, in 1985 Oregon amended its statute to read:

> (2) Any person dissatisfied with the ballot title for an initiated or referred measure certified by the Attorney General *and who timely submitted written comments on the draft ballot title* may petition the Supreme Court seeking a different title...
>
> ...
>
> (5) When reviewing a title prepared by the Attorney General or by the Legislative Assembly, *the court shall not consider arguments concerning the ballot title not presented in writing to the Secretary of State*...

ORS 250.085 (emphasis added).[3] The Oregon Supreme Court explained the import of these changes:

[3] The italicized language cited was entirely new. Previously, ORS 250.085 stated:

> Any person dissatisfied with a ballot title for an initiated or referred measure filed with the Secretary of State by the Attorney General or Legislative Assembly, may petition the Supreme Court seeking a different

> [S]ubsections (2) and (5) of ORS 250.085 were added to Oregon statutes [in 1995]. The purpose of these new provisions, as evinced by their language, was to remove from the judiciary and concentrate in the administrative branch the process of arriving at an appropriate title for ballot measures. In order to accomplish this purpose, the legislature requires something more than mere participation in the comment process in order to maintain a later challenge to a ballot title in this court...

Kafoury v. Roberts, 736 P.2d 179, 181 (Or. banc 1987). The Oregon legislature amended their ballot title challenge statute to "avoid the possibility of a person's intentionally waiting until the matter is before this court to raise meritorious objections that could have been raised and resolved at the administrative level." *Id*. at 181-182. Clearly, the State and MRL want Missouri's legislature to follow Oregon. Unfortunately for Appellants, this Court cannot compel the legislature to make this choice, and is constrained by the plain language of the statute.

4. The Auditor Himself Fails to Follow the Plain Language of Section 116.175 that He Insists Be Used to Bar Missouri Citizens from Seeking Judicial Relief

The State's argument is further weakened by the admission of the Auditor that not even he follows Section 116.175, RSMo or the regulation promulgated

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> title and stating the reasons the title filed with the Court is insufficient or unfair.

thereunder. At the very least, it is disingenuous for the Auditor to use the plain language of Section 116.175 in an attempt to bar citizens from bringing forth information that may be of importance to voters despite it being past the statutory ten day deadline, when the Auditor doesn't adhere to the statutory deadline.

The Auditor's corporate representative, Jon Halwes, admits that he ignores the ten-day deadline found in Section 116.175. Ex. 9 at 15. Nor does he review fiscal impact statements to ensure they comply with GASB standards as required by Section 116.175. Ex. 9 at 15. In addition, he has admitted he does not rely on or follow 15 CSR 50-5.010, the regulation promulgated by the Auditor that purportedly governs submission of proposed statements of fiscal impact. Ex. 9 at 15. Halwes stated "[T]here is no requirement [in Section 116.175] that says that if it comes in after that point, it cannot be included [in the fiscal note]." Similarly, in Section 116.190, there is no requirement that if information comes in after that point, or after the preparation of the fiscal note, that it cannot be evidence at trial.

C. The Existing Statutory Scheme Does Not Require this Court to Judicially Engraft New Requirements

For several reasons, this Court should not judicially engraft new statutory requirements, imposing a straightjacket on the reviewing circuit court and essentially placing the Auditor in complete control of the record on review.

1. The Auditor Is In the Best Position to Develop the Record Were He Willing or Able to Do So, But Is Also in the Best Position to Artificially Deprive Concerned Citizen-Plaintiffs of a Means of Review

The Auditor claims unfettered discretion under Section 116.175.1, RSMo in deciding which agencies to contact for comments—or to contact no agencies at all. By exercising this claimed prerogative to exert minimal information-compiling efforts, the Auditor could control the record, suffocate any serious review of his summary, and effectively circumvent the "insufficient and unfair" standard, depriving concerned citizens of any means to hold the Auditor to the substantive requirements of Sections 116.175 and 116.190.

It is no answer that citizen-plaintiffs can simply create their own record by filing statements with the Auditor within ten days. First, only an avowed "proponent" or "opponent" may file a "statement of fiscal impact." § 116.175.1. RSMo. A citizen-Plaintiff who does not fall in either category (at least within ten days after learning that a petition has been filed and forward to the Auditor) will not have that opportunity.

Second, the "proponent's" or "opponent's" statement must meet various technical requirements, including the standards of the "governmental accounting

board" and of Section 23.140, RSMo.[4] A citizen-challenger under Section 116.190 who is not a proponent or opponent is thus left to rely on the efforts and whim of others. Significantly, the Auditor makes no public announcement when he receives an initiative petition from the Secretary and the 10-day clock begins to run. For opponents, this can make assembling a complete and technically conforming statement exceedingly difficult if not impossible. Indeed, sometimes even proponents, who should know almost exactly when the 10-day clock runs because the Auditor receives the petition within a day or so of their filing, are caught asleep at the wheel. *See* MRL Br. 46 (claiming that Intervenors MRL and Bryan "were forced to rely on the Auditor," and "had no input" into the preparation of the fiscal note because they failed to file fiscal impact statements).

Finally, proponents and opponents have less access to state governmental entities than does the Auditor. While proponents and opponents can try to quickly "sunshine" public entities pursuant to Chapter 610, RSMo. (indeed, the Auditor could do the same, as he or his staff are a member of the "public" under Section 610.023.2), the statute allows agencies to wait three days to respond, and (often) to

[4] As discussed below, Section 23.140 contains a long list of requirements for the preparation of fiscal notes for legislation by the Oversight Division of the Committee for Legislative Research ("CLR"). CLR also prepared fiscal notes for initiatives until this Court declared the task outside CLR's constitutional authority. *Thompson v. Comm. on Legis. Research*, 932 S.W.2d 392, 395 (Mo. banc 1996).

wait even longer to actually produce documents. § 610.023.3, RSMo. The Auditor is much more likely to receive agencies' public records under Chapter 610 within 20 days than are proponents and opponents to receive the same records within just 10 days, especially when it takes them a few days to learn that the Auditor has received the sample petition and that the 10-day clock is running. Further, the Auditor is a repeat player in the fiscal note process, has the power to audit many public entities, and is much more able than proponents or opponents—let alone a Section 116.190 citizen-plaintiff who is neither a proponent or opponent—to develop the record.

2. Allowing the Development of a Full Record at the Circuit Court Recognizes the Reality that the Auditor's Decision Is Akin to a Non-Contested Case

Were it not for Section 116.190's provision of a specific means of judicial review under a heightened "insufficient or unfair" standard, plaintiffs could still challenge the fiscal note and summary as a Section 536.150 "non-contested case," developing a full factual record in the circuit court to allow *de novo* review. *See* § 536.150, RSMo. This is significant. It confirms that the absence of specific language in Section 116.190 prohibiting the court from considering any evidence outside the materials gathered by the Auditor means that Section 116.190 challenges should proceed as a species of a non-contested case (albeit under a heightened "insufficient or unfair" standard, rather than Section 536.150's "arbitrary or capricious" standard).

Under Section 536.150, RSMo, the court "may determine the facts relevant to the question [of the existence of a duty, right, or privilege] and may hear such evidence on such question as may be properly adduced, and the court may determine whether such decision, in view of the facts as they appear to the court, is unconstitutional, unlawful, unreasonable, arbitrary, or capricious or involves an abuse of discretion." § 536.150.1, RSMo. Substantially the same rule applies in petition cases: the circuit court's adjudication of the sufficiency of a petition is "a matter of original evidence" and is not restricted to the record before the Secretary of State. *See Ketcham v. Blunt*, 847 S.W.2d 824, 830 (Mo. App. W.D. 1992) (the Secretary of State makes "the ultimate administrative determination as to whether the petition complies with the Constitution of Missouri and with the statutes," but "it is the courts who are charged with the ultimate judicial determination as to whether…the petition is sufficient…"). *Ketcham* approved the circuit court's consideration of additional evidence regarding signatures that was not before the Secretary of State by the time he had certified the number of signatures in the petition, reasoning that the "ultimate question" of signature validity "was a matter of evidence in the circuit court." *Id*. at 831.

Consistent with *Ketcham*'s holding that officials' determinations must ultimately be reviewed on a full factual record in the circuit court, the triggers for review of a "non-contested case" under Section 536.150, RSMo are present here. When the Auditor purports to "assess" the fiscal impact of an initiative, he fixes mandatory content for (1) the petitions that Missouri voters have a legal right,

duty, and privilege to circulate among themselves and, whether "pro" or "con," use in their pre-election political debate; and (2) ballots that voters have a legal right, duty, and privilege to use at the polls if sufficient numbers of voters sign the petition. Because the Auditor conducts no hearing in determining these "legal rights, duties, or privileges," and absent Section 116.190, RSMo, there would be no other means of judicial review, his decision is akin to a non-contested case which would ordinarily be reviewable *de novo* on a full factual record by a circuit court under Section 536.150, RSMo. *See State ex rel. Martin-Erb v. Mo. Com'n on Human Rights*, 77 S.W.3d 600, (Mo. banc 2002) (lack of other statute allowing review of probable cause decision opened that decision to "arbitrary and capricious" review under Section 536.150).

Although Section 116.190, RSMo applies in this case because it is the more specific statute, Section 536.150 is a close relative, and its general principles should establish a baseline for considering what is required under Section 116.190. A core similarity between the typical non-contested case and the Auditor's proceedings here is the lack of any semblance of formal proceedings before the administrator (here, the Auditor). As this Court has held, this makes the circuit court a necessary forum for developing a record to allow meaningful review:

> In either a contested or a non-contested case the private litigant is entitled to challenge the governmental agency's decision. The difference is simply that in a contested case the private litigant must try his or her case before the agency, and judicial review is on the

> record of that administrative trial, whereas in a non-contested case the private litigant tries his or her case to the court. Depending upon the circumstances, this difference may result in procedural advantages or disadvantages to the parties, but in either situation, the litigant is entitled to develop an evidentiary record in one forum or another.

City of Valley Park v. Armstrong, 273 S.W.3d 504, 506-07 (Mo. banc 2009) (holding that a board's allowance of 15 minute oral presentation was not a "hearing," that the matter should be treated as a non-contested case, and affirming the trial court's invalidation of the board's action).

When it adjudicates a petition for a writ or injunction challenging a non-contested case, the trial court "conducts a *de novo* review in which it hears evidence on the merits, makes a record, determines the facts and decides whether the agency's decision is unconstitutional, unlawful, unreasonable, arbitrary, capricious or otherwise involves an abuse of discretion." *Id*. at 508. While the circuit court cannot supplant any discretion vested in the agency, it "does not defer to facts found or credibility assessed by the agency and need not conform doubtful evidence to the agency's decision." *Id*.

Thus, the background rules that would apply if Section 116.190 had not been enacted fully contemplate a trial on the facts that is unlimited by the spare "record," such as it was, that may have been gathered by the Auditor. Citizen-plaintiffs must have some forum for proving whether the Auditor has fairly and

sufficiently estimated the fiscal impact of a proposal, and that forum is the circuit court.

3. The Real Danger to the Fiscal Note Process Is the Auditor's Failure to Conduct a Bona Fide Assessment, not Private Parties' "Withholding" of Government Fiscal Data to Which the Auditor Has Superior Access

Both the State and MRL claim concern that parties will "withhold information" from the Auditor during the 10-day period, and then use it at trial to prove the fiscal note or summary is insufficient or unfair. This concern misunderstands the fiscal note process and completely ignores the real danger: the Auditor's own failure to conduct a bona fide assessment.

First, the State and MRL's purported concern is actually quite limited in scope; it can only apply to citizen-plaintiffs who also learned of the filing of the petition and qualified as "opponents" or "proponents" of the initiative at a very early date, within the first ten days after the Auditor received the sample petition page. In contrast, Section 116.190 plaintiffs who merely have an interest in ensuring that the Auditor and Secretary do their duty in preparing the ballot title, but who do not oppose or propose the petition (or who weren't able to make an informed decision within ten days if they happened to learn that the petition had been received by the Auditor) have no right to submit materials to the Auditor for his consideration under Section 116.175.1, RSMo. The Auditor never posts fiscal note requests, and because his office only recognizes submissions "in terms of a

proponent or opponent," neither "solicits" nor "takes" "public comments" on proposed fiscal notes. 3/27/12 Tr. 17:1-10. Thus, there is no opportunity for plaintiffs who were not proponents or opponents to have "withheld" information. In these cases, there is no evidence in the record that any plaintiff supported or opposed the petition during the 10-day period.

Second and most importantly, the State and MRL seriously mischaracterize the process. Information regarding the fiscal impact of proposed legislation on state and public entities is almost entirely public information. It is information that is (or should be) in the possession of the governmental agencies surveyed by the Auditor. Plaintiffs can have no secret "information" about the workings of government that they "withhold" from an officer of the government. If the staff of the Auditor's office is performing a bona fide "investigation" within the office's constitutional authority and competence when it prepares fiscal notes, then private parties should not be able to "surprise" the Auditor with information (or, as in this case, mere logical reasoning) about the workings of the same agencies and political subdivisions the Auditor audits.

In this case, the facts showed that within 10 days of receiving the petition, the Auditor learned that an entire category of lenders ("510" lenders) had not been included in the final analysis of DIFP. 3/27/12 Tr. 61:5-62:20. The Auditor learned this not through his own efforts, but because an opponent, Dr. Joseph Haslag, used the Sunshine Law to uncover an internal electronic communication within the Missouri Division of Finance, a division of DIFP which regulates "510"

lenders. Tr. 61:25-62:14; *see also* Ex. 7. The communication mentioned that a sizable portion of "510" lenders would close. *Id.*

The Auditor could have used the same process as Dr. Haslag to uncover these documents. Indeed, the Auditor did not even need to use the Sunshine Law because his staff had a working relationship with the agency, as it has with all agencies. 3/27/12 Tr. 77:25-79:6. How did the Auditor use this privileged access to the regulator's information? At trial, Jon Halwes, the Auditor's fiscal note writer, admitted that he merely spoke with an agency employee, Grady Martin, about how a private party was able to sunshine its internal communications, but incredibly, he made no effort to follow up on the analysis or ask it if was true. Tr. 62:8-63:19. Indeed, Mr. Halwes admitted that he performed no independent analysis whatsoever. Tr. 36:1-9. How can the Auditor claim "surprise" and "sandbagging" when the facts show he was confronted with the facts within the first 10 days of his 20-day review? Sadly, this argument is merely a cover for the Auditor's own negligence.

There is every reason to believe that this story will be (and has been) repeated in fiscal note after fiscal note. The governmental cost and revenue information the Auditor seeks is uniquely in the possession of state and local entities he audits—not with third parties. At worst, the information is equally available to everyone through the Sunshine Law or through minimal effort to pull

from public sources,[5] although for the reasons discussed above, it is much easier for the Auditor to retrieve than for private parties.

The real danger is *not* that private parties will choose the risky course of undertaking onerous efforts to quickly acquire the government's own fiscal information and then "withhold" it from the government in the hope of a highly speculative litigation payoff months down the road. Rather, it is that the Auditor

[5] MRL seriously miscasts the opinion of Dr. Thomas Durkin, presented by Plaintiffs Francis and Hoover, as based primarily on "data provided to him by 510 lenders and consumer survey information he had obtained from the Federal Reserve Board." MRL Br. 22. In fact, Dr. Durkin's primary data source was Missouri's Division of Finance, which issues a report available online detailing the dollar value of loans extended by "510" lenders. 3/27/12 Tr. 190:15-192:9; 195:17-25. The only portion of Dr. Durkin's opinion relying on information from "510" lenders was his assumption that most "510" lenders are not so large that they could come close to surviving a 36% cap (Tr. 187:4-189:6), and that approximately 2,200 workers are employed in the industry (Tr. 192:10-193:5). Neither input was critical to Dr. Durkin's testimony or ultimate conclusion of a $14.5 million fiscal impact, and as the circuit court pointed out, the real issue is not whether the Auditor adopted Dr. Durkin's precise number, it is the Auditor's failure to make any calculation or draw any conclusion regarding "510" lenders at all. *See* L.F. 206-208.

continues to paste together mere compilations of others' submissions, passing off the "summary" of the compilation as if it were an informed analysis of fiscal impact like the ones prepared under Section 23.140, RSMo by the Committee on Legislative Research. Giving the Auditor a virtual "pass" if opponents or proponents cannot assemble the government's own information within 10 days and submit it in the proper form is an invitation to continue the status quo.

D. Appellants Confuse the Court of Appeals' Limited Holdings Regarding the Auditor's Discretionary Process with the Question of Whether the End Result of that Process Is Sufficient and Fair Under Section 116.190

Both the State and MRL incorrectly assume that the Auditor's unwritten two-step process of (1) pasting submissions verbatim into the fiscal note, and then (2) summarizing those submissions, has been blessed for all time by two court of appeals decisions. This "process" appears nowhere in the statutes, and Appellants seriously misread the applicable case law.

In practice, the Auditor uses a single employee, Jon Halwes, to prepare fiscal notes and summaries, and no one checks Mr. Halwes' assumptions or calculations (if any). 3/27/12 Tr. 15:17-24. Mr. Halwes doesn't know why his office long ago decided to simply paste submitters' responses into the fiscal note verbatim, "no matter what they say," (Tr. 21:4-25), even if the submission states the proposed measure "will cause cats and dogs sleeping together." Tr. 22:1-4. When receiving submissions, the Auditor performs only a perfunctory review to

make sure no pages or numbers are missing and to ensure the submission relates to the petition and is therefore "reasonable." Tr. 80:10-24. The Auditor's office does not follow the rules it promulgated for submissions. Tr. 14:1-25. Mr. Halwes uses his own subjective judgment in deciding whether to follow up on responses. *See* Tr. 74:20-75:13.

As the Auditor now openly admits, this process "does not at any point require the Auditor to summarize or explain his analysis," (State Br. 33), and indeed, does not even require the Auditor to perform "his own independent analysis." State Br. 40. *See also* 3/27/12 Tr. 95:16-20 (Mr. Halwes did not do "any independent analysis" in preparing "the actual wording for the fiscal note summary."). Instead, Mr. Halwes simply "summarizes" those points he "believe[s] are important for the public." Tr. 84:11-13. Appellants argue that fiscal notes and summaries that follow this "process" are immune from attack.

This reasoning misapplies the Court of Appeals' holdings. *See Missouri Municipal League v. Carnahan*, 303 S.W.3d 573 (Mo. App. W.D. 2010) ("*MML I*"); *Missouri Municipal League v. Carnahan*, 2011 WL 3925612 (Mo. App. W.D. 2011) (trans. denied Dec. 20, 2011) ("*MML II*"). The latter case, *MML II*, merely held that the Auditor need not promulgate his procedures (such as they were) as rules. In *MML I*, the court accepted as true that the Auditor performed a three-step process:

(1) placing entities' responses in the fiscal note if they are reasonable and complete;

(2) obtaining clarification from an entity if its response is unclear; and

(3) if responses are unreasonable, placing less weight on the response in the fiscal note summary.

Id. at 582. The court merely held that Section 116.175 "does not mandate that the Auditor adopt *another method of independently assessing* the costs or saving of the proposal." *Id*. (emphasis added). The court did *not* hold that every time the Auditor undertakes this three-step process, the result must be deemed sufficient or fair under Section 116.190, RSMo, or that reviewing courts cannot look to the true facts regarding a proposal's fiscal impact in deciding whether the Auditor's work product is "sufficient and fair." Indeed, even after disposing of the attack on the Auditor's process, the court examined the record, finding "there is nothing in the record indicating the public will be misinformed of the fiscal impact." *Id*.

Significantly, the court seemed to believe that the Auditor nonetheless "independently assess[es]" the costs or savings of the proposal. *Id.* at 582. As discussed above, however, the facts of this case are different: Mr. Halwes admitted that he had made no independent analysis. Even after talking to DIFP, which failed to include "510" information (in contrast to the entity's internal document transmitted to the Auditor by Dr. Haslag), Mr. Halwes made no effort whatsoever to address "510" lenders.

Whatever the merits of *MML I* and *II* in interpreting Section 116.175, this case presents far different facts. Using *MML I* and *II* to absolve the Auditor's

conduct on these facts would remove the last conceivable restraint on the Auditor and render meaningless and unenforceable the requirements of "sufficiency" and "fairness" in Section 116.190. Instead, the trial court should be affirmed and the *MML* cases distinguished.

E. If the Constitution Requires Any Particular Construction of Section 116.190, it Requires Allowing a Full Record in the Circuit Court

If the Missouri Constitution has any application to the circuit court's review of the Auditor's fiscal note decision under Section 116.190, RSMo, it should allow citizen-challengers to develop a full record. *See* Mo. Const. Article V, Section 18. "All final decisions, findings, rules and orders on any administrative officer or body existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights, shall be subject to direct review by the courts as provided by law; and such review shall include the determination whether the same are authorized by law, and in cases in which a hearing is required by law, whether the same are supported by competent and substantial evidence upon the whole record." *Id*.

Because the Auditor conducts no hearing, and only "opponents" and "proponents" have a right to make submissions, plaintiffs who merely desire an accurate fiscal note and ballot title would be completely frozen out of the process without the opportunity to develop a record before the circuit court. For a variety of reasons, allowing citizen-plaintiffs to fully develop the record before the circuit court is the fairest rule. *See* Section II.C, *infra*.

MRL nonetheless argues that the constitution *requires* denying citizen-plaintiffs the right to fully develop a record in the trial court. Surely the argument that third parties have a "right" to block plaintiffs from introducing evidence is a constitutional rarity, and not surprisingly, MRL's argument makes several logical and legal leaps.

First, MRL is correct that the initiative process is "participatory democracy in its purest form." MRL Br. 43. However, this hardly justifies denying citizen-plaintiffs with a statutory and constitutional interest in a "sufficient" and "fair" initiative process the right to rely on something other than "statements" submitted within a short 10-day window by "opponents" or "proponents." As discussed above, even if plaintiffs are also "opponents" who discovered the petition at some point before the 10-day deadline but failed to submit a statement to the Auditor, the information in the statements is generally public information to which the Auditor has equal or greater access.

Additionally, MRL's complaint that plaintiffs' ability to submit evidence in a Section 116.190 challenge is a "virtual veto" over ballot measures wildly overstates reality and the factual record in this case. First, as a matter of logic and law, any plaintiff who learns of a petition and fails to submit information to the Auditor has little incentive to take the risk of remaining silent; the mere absence of information in the fiscal note, while not dispositive, may cause the circuit court to doubt that a diligent Auditor should have uncovered it himself. (Of course, that is

not the case here, as the Auditor *did* receive notice of the impact on "510" lenders and failed to undertake any investigation.)

Second, MRL was in the best position to submit a timely statement, but chose to "rely on the Auditor" and remain silent. MRL Br. 46. Further, setting aside MRL's wildly inaccurate and subjective summary of events at trial (with no citations to the record) it was mere happenstance that Dr. Durkin was not disclosed in discovery. That results from the State's litigation strategy in this particular case, not from a constitutional defect in Section 116.190, RSMo.

Finally, MRL resorts to hyperbole, claiming that "Section 116.175.1's unambiguous time limits [were] not enforced in this case." MRL Br. 47. As discussed above, Section 116.175 applies to "proponents'" and "opponents'" deadlines to submit statements in a particular form; it does not apply to evidence that citizen-plaintiffs may introduce in Section 116.190 proceedings. In sum, the statutory requirements are clear and fair and need no judicial modification. If anything, the constitution and the integrity of the initiative process require that the Auditor's otherwise-unsupervised preparation of mandatory content for petitions and ballots be carefully reviewed on a full record.

III. THE TRIAL COURT CORRECTLY FOUND THAT THE FISCAL NOTE AND FISCAL NOTE SUMMARY ARE INSUFFICIENT AND UNFAIR ON THE GROUND THAT THEY DID NOT INCLUDE ANY FISCAL IMPACT ON 510 LENDERS (RESPONDS TO STATE'S BRIEF POINT IV)

The trial court correctly found that the Auditor did not consider and include in the fiscal note the petition's effect on 510 lenders. The State claims this is not *factually* accurate. The State bears a heavy burden to show that the trial court erred based on fact issues. When facts relevant to an issue are contested, the reviewing court defers to the trial court's assessment of the evidence. *White v. Director of Revenue*, 321 S.W.3d 298, 307-08 (Mo. banc 2010). In addition, fact issues without specific findings in the judgment are considered on appeal as being have found in accordance with the result reached (here that the fiscal note and fiscal note summary are insufficient) and this court will affirm the trial court's judgment if it is correct on any reasonable theory supported by the evidence. *Safeco Ins. Co. of America v. Stone & Sons, Inc.* 822 S.W.2d 565 (Mo. App. E.D. 1992).

A. Standard of Review

The applicable standard of review for appeals of court-tried civil cases is found in *White v. Director of Revenue*, 321 S.W.3d 298, 307-308 (Mo. banc 2010). The judgment of the trial court is affirmed "unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously

declares or applies the law." *White*, 321 S.W.3d at 307-08 (citing *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo banc. 1976)).

The determination of the court as to whether the Auditor's Fiscal Note and Fiscal Note Summary was insufficient or unfair was, in part, a determination of law. This Court applies *de novo* review to questions of law decided in court-tried cases. *Id.* at 308. Questions of law are reviewed "independently [and] without deference to [the trial court's] conclusions." *Moore v. Bi-State Dev. Agency*, 132 S.W.3d 241, 242 (Mo. banc 2004).

The court's determination of whether fiscal note and summary were insufficient or unfair was, in part, a determination of contested fact. Evidence is contested when one "dispute[s] a fact in any matter." *White*, 321 S.W.3d at 308. A factual issue is contested when party presents contradictory or contrary evidence, through cross-examination, through pointing out internal inconsistences in the evidence. *Id.* The role of the appellate court is not to "re-evaluate testimony through it own perspective" but rather, the court "confines" itself to the standard set forth in *Murphy v. Carron. Id* at 309. "Appellate courts defer to the trial court on factual issues 'because it is in a better position not only to judge the credibility of witnesses an the persons directly, but also their sincerity and character and other trial intangibles which may not be completely revealed by the record." *Id.* at 308-09 (quoting *Essex Contracting Inc. v. Jefferson City.*, 277 S.W.3d 647, 652 (Mo. banc 2009)). In addition, fact issues without specific findings in the judgment are considered on appeal as being have found in

accordance with the result reached (here that the fiscal note and fiscal note summary are insufficient) and this court will affirm the trial court's judgment if it is correct on any reasonable theory supported by the evidence. *Safeco Ins. Co. of America v. Stone & Sons, Inc.* 822 S.W.2d 565 (Mo. App. E.D. 1992).

The trial court found that both Drs. Haslag and Durkin were "well qualified and highly credible" and "experts in the field of economics." L.F. 206. The court found they that "relied on facts and data reasonably relied upon by experts in their fields, and the facts and data upon which they relied were otherwise reasonably reliable." *Id.* The court found that the Auditor accepted the analysis of Dr. Haslag as factual. *Id.* The court found the Auditor's fiscal note "acknowledges" a negative impact on 510 lenders, but did not include any analysis of the impact in the fiscal note. L.F. 207. The court found that Dr. Durkin's testimony provided the fiscal impact on state revenues based on the proposed measure's impact on 510 lenders. *Id.* The court found that the Auditor admitted the fiscal note and summary did not include the impact on 510 lenders or on local government entities and the inclusion of such would increase the (negative) fiscal impact to the state. *Id.* While the trial court states that many of these facts are "undisputed" such facts were still "contested" as described in *White*, and therefore this Court should defer to the trial court's determination of such facts.

B. The Omission of Impact on 510 Lenders from the Fiscal Note and Summary

The State claims that the trial court erred in finding that there had been a complete omission of any fiscal impact on 510 lenders in the fiscal note and fiscal note summary because "there was evidence that the submission of [DIFP] reflected its analysis as to the effect on 510 lenders" and the DIFP response was included verbatim in the fiscal note. State Br. 43. Contrary to Appellants' assertions, the record unequivocally supports the trial court's finding.

The State admits, in its brief, that the contents of Division of Finance estimate of fiscal impact were not included in the fiscal note. The State indicates that such estimates were not included in the official response from DIFP, the parent body of the Division of Finance, which was included verbatim in the fiscal note. *Id.* at 45. The State justifies this by pointing to Mr. Halwes' testimony that the Division's estimates were "incorporated" into the estimate of DIFP that there would "no cost or savings to the Department." *Id.* at 45; 3/27/12 Tr. 89. Mr. Halwes testified that the following statement of DIFP includes the Division of Finance's estimated $675,000 loss:

> If the adoption of the measure results in a reduction of fee revenue from consumer credit entities, the department anticipates it would expend a correspondingly smaller amount to regulate these entities.

LF 35; Tr. 27-28, 89. According to Halwes, DIFP's response that there is "no cost or savings to the Department" means that the amount of fee revenue lost by

business closures must equal the savings generated by decreasing regulatory staff. Tr. 27-28, 89. While the State claims Plaintiffs failed to show that this conclusion was unreasonable, Plaintiffs showed that the conclusion was mere speculation by Mr. Hawles and was unsupportable based on calculations by Dr. Haslag.

Hawles testified he was only *speculating* as to whether the Division of Finance's estimated effect on 510 lenders was included in the DIFP estimate. 3/27/12 Tr. 28: 12-14. He claimed the two were "talking about the same revenues," but when pressed, confessed that he was not sure and that he did not speak with the Division or Department or look at any documentation in an attempt to clarify what was included in the DIFP estimate. Tr. 28:2-14.

The Division of Finance indicated that the closing of payday, title and some 510 lenders would result in a loss of $675,000. They indicate an estimated savings to the Department on account of decreasing the consumer credit examination staff by 4 or 5 examiners. LF 46. Dr. Haslag testified that even assuming the Division let go the five highest paid grade 3 examiners, it would only total $487,500, and be nearly $200,000 short of being a "wash" as suggested by Mr. Halwes. 3/27/12 Tr. 140-44. Basic math and the testimony at trial show that the DIFP's response did not incorporate the impact on 510 lenders that the Division of Finance had at one time indicated.

The State claims that Halwes concluded that the Division of Finance's comments were evaluated and modified by DIFP before submitting its official response. The Auditor claims this is a reasonable conclusion, and that Plaintiffs

failed to show otherwise. To the contrary, Plaintiffs proved Halwes did not know whether DIFP's response incorporated the Division of Finance's figures. In conclusion, the plain language of DIFP's response and basic math shows that the effect on 510 lenders was not included in the fiscal note or fiscal note summary.

IV. THE TRIAL COURT DID NOT ERR IN RULING THAT THE FISCAL NOTE AND FISCAL NOTE SUMMARY ARE INSUFFICIENT AND UNFAIR ON THE BASIS THAT PLAINTIFFS' EVIDENCE DID NOT SPECIFICALLY IDENTIFY LENDERS AFFECTED BY THE BALLOT INITIATIVE WHO WERE NOT ALREADY CONSIDERED IN THE FISCAL NOTE OR FISCAL NOTE SUMMARY (RESPONDS TO STATE'S BRIEF POINT V)

Appellants attempt to manufacture confusion or ignorance in the trial record regarding 510 lenders; however, the Auditor's own witness was not confused as to what 510 lenders are. Further, the testimony of multiple witnesses addressed, without objection, what 510 lenders entail. All of the witnesses further testified that the 510 lender impact was not calculated. Thus, regardless of which specific types of 510 lenders were excluded from the fiscal note or fiscal note summary or the exact percentage of 510 lenders that do not offer payday or title loans, the undisputed evidence makes clear that the proposed measure would impact at least some 510 lenders which would result in negative impacts to both the state and local governments. This Court should defer to the trial court's

evidentiary determinations. The evidence shows that the fiscal note and fiscal note summary did not include any negative impact associated with the effects on 510 lenders and thus the fiscal note and fiscal note summary were insufficient and unfair, as the trial court properly held.[6]

The Auditor claims there is "no way to know" whether or not fiscal impact information on any 510 lenders was excluded from the fiscal note or fiscal note summary. The way to know is by examining the record made at trial. The evidence showed that 510 lenders would be impacted by the proposed measure, that the Auditor relied on an analysis that did not include 510 lenders, that the fiscal note and fiscal note summary did not include any potential impact to 510 lenders, and that inclusion of the impact on 510 lenders would have increased the negative impact to state and local governments.

The State inexplicably claims that nothing in the record established that the judge, witnesses, and attorneys agreed on a common definition of "510" lenders. This is a red herring. The statute itself was offered at trial and the Court took judicial notice of it. 3/27/12 Tr. 218-219; Ex. 6. The plain language of the statute refers to "consumer installment lender[s]." The record reflects that all parties involved understood the meaning of "510 lenders."[7]

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[6] The standard of review mirrors that for Point IV.

[7] Halwes agreed "there are other lenders other than payday lenders and title lenders, known as 510 lenders." Tr. 35:21-25. He understood 510 lenders are

The State claims that the trial court erred because (1) Plaintiffs' expert did not specify a type of 510 lender that would be affected by the proposed measure that was not included in the fiscal note, and (2) there was no testimony as to what percentage of 510 lenders do not also provide payday or title loans. These specifics are immaterial to the ultimate question of whether the fiscal note or summary is insufficient. The record supports the following facts: (1) 510 lenders would be affected by the proposed measure, (2) the Auditor relied on Haslag's analysis which did not include any potential impact to 510 lenders, (3) the Fiscal Note and Fiscal Note Summary did not include any impact on 510 lenders, and (4) the inclusion of the impact of 510 lenders would have increased the negative

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known as "installment lenders" and that "510 lenders" refers to lenders under Section 408.510, RSMo, which labels the lenders as "consumer installment [lenders]." Tr. 61:9-11, 17-24. The Auditor's counsel referred to "510 lenders" as "510 installment companies." Tr. 2:9-10. During the testimony of Dr. Haslag, "510 lenders" were referred to as "installment lenders." Tr. 137:1-4. Dr. Haslag answered in the affirmative when asked directly by the Auditor's counsel "[D]o you know when I say that phrase, 510 company, what that is?". Tr. 170:14-17. Dr. Durkin also answered in the affirmative when asked directly "Do you have an understanding of what 510 lenders are?" and specifically confirmed that 510 lenders are also referred to as "installment lenders." Tr. 178:25, 179:1-10.

impact to state and local governments. The record also indicates that DIFP's analysis does not include 510 lenders.

Mr. Halwes testified that the proposed measure would cause businesses to close. 3/27/12 Tr. 30: 7-12. He also testified that in formulating the fiscal note, he relied on the analysis of Dr. Haslag. The record shows that Dr. Haslag's estimates included information on the effects of closures of payday lenders and title lenders. Tr. 35:15-20. The record shows that Dr. Haslag's estimates did not include any analysis based on the closure of 510 (installment) lenders. Tr. 36:1-5; 61:2-4; 131:4-14; 137:1-3. Halwes testified that the fiscal note and summary failed to contain any analysis as to the impact upon installment (510) lenders. Tr. 61:25, 62:1-3.

Dr. Haslag testified that the fiscal note and summary failed to include any impact on 510 lenders. 3/27/12 Tr. 151:8-25. He indicated that if the fiscal impact from the 510 lenders had been included, it would increase the negative impact to both the state and local government entities. Tr. 152:1-10. He confirmed these negative impacts were not reflected in either the fiscal note or fiscal note summary as prepared by the Auditor. Tr. 153: 1-11. Dr. Durkin concurred with Mr. Halwes and Dr. Haslag, testifying that neither the fiscal note nor the fiscal note summary included the proposed measure's impact of 510 lenders and the resulting negative impact on state or local government entities. Tr. 204:8-16.

The Auditor attempts to save the fiscal note and fiscal note summary by pointing out that Halwes testified the submission of DIFP does reflect its analysis as to the effect on 510 lenders. This is a mischaracterization. Hawles testified he was only *speculating* as to whether the Division of Finance's estimated effect on 510 lenders was included in the DIFP estimate. 3/27/12 Tr. 28:12-14. He claimed the two were "talking about the same revenues," but when pressed, confessed that he was not sure and that he did not speak with the Division or Department or look at any documentation in an attempt to clarify what was included in the DIFP estimate. Tr. 28:2-14. The Division of Finance indicated "no costs or savings to the Department." L.F. 35. The Division of Finance suggested a significant loss in revenue as a result of 510 (and other) lenders going out of business. L.F. 46. If DIFP had included the costs indicated by the Division of Finance, then its conclusion would not have been "no costs or savings to the Department."

Dr. Durkin testified that the 510 industry would shut down as a result of the proposed measure.[8] Ex. 14. The loss of these consumer installment loans, would

[8]The Auditor ignores context in criticizing Dr. Durkin's testimony. While Dr. Durkin suggested that he did not "spen[d] a lot of time" looking specifically at Section 408.510, RSMo, this response related to the issue of whether he understood the term "510 lenders." When asked, he affirmed that he was familiar with the terminology and proceeded to explain and define his understanding of 510 lenders. Tr. 178:25, 179:1-10. While he did accept another individual's

result in the following fiscal impacts (1) reduce state sales tax revenues in year 1 and 2 by $5.44 million, (2) reduce income tax revenues by $1.2 million in year 1, (3) reduce state sales tax revenues from former employees due to belt tightening by $.845 million, (4) increase unemployment compensation by $6.6 million, and (5) reduce business income tax revenues by $.504 million. Ex. 14, 3/27/12 Tr. 189-197. As a result of the proposed measure's impact on 510 lenders, the total negative impact in year 1 would be $14.589 million and in year 2, $5.944 million. *Id*. None of this was included in the fiscal note or fiscal note summary.

Regardless of which specific types of 510 lenders were excluded from the fiscal note or fiscal note summary or the exact percentage of 510 lenders that do not offer payday or title loans, the undisputed evidence makes clear that the proposed measure would impact at least some 510 lenders which would result in negative impacts to both the state and local governments. The evidence shows that the fiscal note and fiscal note summary did not include any negative impact associated with the effects on 510 lenders.

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estimate of total employees in the 510 industry, the individual was a Missouri lawyer at a professional convention. Dr. Durkin testified that the exact number would be difficult to verify, but that through his review of other materials the estimate was reasonable. Tr. 192:10-19. Finally, that a precise "distribution of companies" was not established by Dr. Durkin, or anyone else, is immaterial.

V. THERE ARE NUMEROUS ALTERNATIVE GROUNDS UPON WHICH THIS COURT SHOULD AFFIRM THE TRIAL COURT'S FINDING THAT THE FISCAL NOTE AND SUMMARY ARE INSUFFICIENT AND UNFAIR

The decision below should be affirmed on the grounds as described above, but alternatively, can be affirmed because the fiscal note and summary failed: (1) to state an amount for local government losses when such amount was certain; (2) to include costs related to unemployment insurance; (3) to include costs related to loss of local tax revenue; and (4) on basic math. *See Missouri Soybean Ass'n v. Missouri Clean Water Com'n*, 102 S.W.3d 10, 22 (Mo. banc 2003) (allowing affirmance on alternative grounds unarticulated by trial court).

A. The Fiscal Note Summary Falsely States that Local Government Losses "Could" Not Occur or Are Uncertain

Mr. Halwes admitted-and both experts agreed-that local government losses were certain to occur. 3/27/12 Tr. 68-69, 147-48, 198-200. On the issue of direct losses, the only variable was the amount of fee license income paid by lenders who would close their doors under the direct cap. Dr. Durkin established other losses, such as lost revenues from local sales and earning taxes. Tr. 199-200. Dr. Haslag testified that local political subdivisions would have losses of at least $122,000 based on a sampling of two cities that would lose license fee revenue. Tr. 147. On broader measures of revenue, he noted that he had calculated only state-level losses based on business closures, even though the same effects would

cause losses for revenue-collecting local subdivisions. Tr. 152. Even after receiving obviously incomplete or inconsistent responses from cities, some of which indicated no fiscal impact from the closure of businesses, Mr. Halwes admitted that he did nothing to follow up with or obtain clarification from even one local entity. Tr. 73-74.

Against this evidentiary background, the Auditor summarized the local impact as follows: "Local governmental entities could have unknown total lost revenue related to business license or other business operating fees if the proposal results in business closures." Jt. Ex. 3.

This statement is flawed. First, the statement avers that cities "could" lose license revenue "if" there were business closures. But Mr. Halwes admitted closures "would" occur. 3/27/12 Tr. 30. Indeed, the top half of the summary is entirely based upon this assumption. Halwes knew from Dr. Haslag that at least some cities did charge license fees which would be lost when stores closed. The only question was how many cities charged these fees and the amounts they charged. Thus, the statement falsely suggests that there is something contingent about license fee losses, when in fact, the undisputed facts showed-both at trial and when the note was being drafted-that they are certain.

Second, Mr. Halwes refused to include the data he did receive. Losses of at least $122,000 were certain. The omission of this data (albeit incomplete) makes the inevitable resulting closures and losses appear somehow uncertain. It is

undisputed that such closures are certain. Thus, the fiscal note and summary are insufficient and unfair.

B. The Fiscal Note Summary Excludes Costs Related To Unemployment Insurance

Although the Auditor admitted every portion of Dr. Haslag's unemployment insurance analysis, his summary fails to even mention the substantial anticipated payouts because of his view that the unemployment compensation fund is not general revenue of the state. 3/27/12 Tr. 45-48. However, the Comprehensive Annual Financial Report of the State of Missouri shows that the fund is a state fund. Ex. 5 at 21-23. Mr. Halwes ultimately provided no reason or authority for his view that a fund that is replenished by direct taxes on employers, and which admittedly would have to charge employers higher rates to recover for job losses anticipated under the initiative, does not include at least one facet of a fiscal impact. In contrast, Plaintiffs' experts, Dr. Haslag and Dr. Durkin, both testified that the taxing of employers into a special fund is a fiscal activity, and that outlays from that fund that will require higher taxes should be included in a fiscal impact statement. Tr. 130-35, 190-95.

Further, Dr. Haslag testified that even if the Auditor refused to consider actual outlays by the fund, taxes to cover those outlays would themselves cause direct fiscal impacts. First, increased payments into the fund to cover increased jobless benefits would lower corporate income-and, therefore, would lower tax collections for the purposes of general revenue-by a fixed amount. 3/27/12 Tr.

134-35. Second, Missouri's unemployment compensation fund has had to borrow hundreds of millions of dollars from the federal government to cover excess payments. Tr. 133. It will have to finance additional obligations by paying interest, which Dr. Haslag believed could be paid from general revenue. Tr. 133-135.

Regardless of the precise manner in which the "unemployment compensation" analysis in the fiscal note was reflected in the summary, it could not have been completely omitted. Once again, Mr. Halwes erred on the side of understating the fiscal impact of the petition as shown in the fiscal note.

C. The Fiscal Note and Summary Exclude the Loss of Local Tax Revenue

The second sentence, addressing costs and savings to local government entities, does not even mention other kinds of local revenue losses from, for example, sales or earnings taxes. The first half of the fiscal note summary includes an analog based on statewide taxes and state revenue, but the bottom half of the summary ignores the existence of parallel taxes at the local level. As Dr. Durkin noted, those can be significant. Halwes admitted that it was “clear” from Dr. Haslag’s report that there would be a “local impact” 3/27/12 Tr. 90. Dr. Haslag testified that there would be lost local license fee revenue. Tr. 147. Halwes admitted there would be state income tax loss, and that he was aware of similar local level income (earnings taxes) but did not include this is the fiscal note or fiscal note summary. Tr. 53-54, 73, 86.

It is undisputed that the proposed measure would cause lost state sales tax revenue. Dr. Durkin testified there would be parallel losses in local sales tax revenue as a result of the proposed measure. 3/27/12 Tr. 199-200. Halwes confirmed there would be a "corresponding impact for local government sales tax revenue." Tr. 69:3-7.

The Auditor may respond that he did not have (and was not required to locate) data on local tax rates, but clearly, such uncertainty has not stopped the Auditor on other aspects of the summary. For example, the Auditor is comfortable referring to "unknown" losses even in cases where-as with local license fees-he actually has hard data. Because the facts of (1) closures and (2) tax losses at all levels are undisputed, the summary should at least have referenced local lost revenues other than license fees.

D. The Fiscal Note Summary Fails on Simple Math

Another serious flaw in the fiscal note summary is one of simple math, and it arises on the undisputed facts. The summary states that state agencies "could have annual lost revenue estimated at $2.5 million to $3.5 million that could be partially offset by expenditure reductions for monitoring industry compliance." L.F. 33. All witnesses agreed that the relevant facts in the fiscal note are in Dr. Haslag's "Table B." 3/27/12 Tr. 30, 31, 195. Table B calculates losses assuming that all title and payday stores close, an assumption which all the witnesses independently investigated and, ultimately, adopted. *See* Exs. 3, 7.

The problem is that even if "expenditure reductions for monitoring industry compliance" are able to completely offset state license fee revenue losses, Table B clearly shows that the lowest possible amount of "annual lost revenue" is approximately $3 million.[9] *See* Ex. 7, Table B (compare total lost state revenue with no offset, which is row two plus row four, to total lost revenue with a complete offset of costs, which is only row 2). The fiscal note summary falsely suggests that lost revenue could start as low as $2.5 million, and even then could be offset by cost reductions. Assuming that all payday and title stores close-an assumption with which there was no disagreement by Mr. Halwes (3/27/12 Tr. 30, 31) and for which there was no contradictory evidence-this simply cannot be correct.

In conclusion, one is left with the impression that in every case where it was possible to minimize or ignore the fiscal impact of certain losses (primarily, closed stores arising from the elimination of an industry) that the Auditor's own review forced him to accept, the Auditor has chosen minimization. Not all of these choices deserve the labels "insufficient" or "unfair," but based on the undisputed facts, they apply here.

[9] Further, although "510" losses are nowhere included in Table B, all three witnesses indicated that the fiscal impacts would increase were "510" numbers added. Tr. 36, 104, 144-147, 196-197.

VI. THE TRIAL COURT DID NOT ERR IN FINDING THAT THE SECRETARY'S SUMMARY STATEMENT IS "INSUFFICIENT, UNFAIR AND LIKELY TO DECEIVE VOTERS" BECAUSE THE STATEMENT IS NOT A "SUMMARY" WITHIN THE MEANING OF THE STATUTE IN THAT IT FAILS TO SUMMARIZE THE MATERIAL POINTS OF THE INITIATIVE PETITION (RESPONDS TO STATE'S BRIEF POINT I, MRL II.A-D)

The legislature has imposed upon the Secretary of State an affirmative duty to provide a summary of initiative petitions. Her duty is to "promote an informed understanding by the people of the probable effects" of the initiative. *Buchanan v. Kirkpatrick*, 615 S.W.2d 6, 11 (Mo. banc 1981). The statute codifies this duty by requiring a 100 word "summary" of the initiative (§116.334 RSMo.) and by allowing courts to review the summary for "insufficiency" or "unfairness." §116.190 RSMo. Contrary to the position of the State and MRL, the Secretary's duties require more than simple "notice" of what initiatives might contain, and courts' review is not limited to whether her words are argumentative. Instead, the Secretary has an affirmative duty to provide accurate and sufficient summaries of the measures. Here, the trial court correctly found[10] that she did not.

[10] The same standard that applies to Points IV and V applies here.

A. The Legislature Has Provided Important Procedural Safeguards To Prevent Abuse of the Initiative Petition Process

Chapter 116, RSMo., specifies procedures for placing an initiative on the ballot. This Court has long recognized that procedural safeguards – both those in the Constitution and those created by the legislature -- are important and necessary in the initiative petition process for two reasons: "(1) to promote an informed understanding by the people of the probable effects of the proposed amendment; and (2) to prevent a self-serving faction from imposing its will upon the people without their full realization of the effects." *Buchanan*, 615 S.W.2d at 11. *See also Knight v. Carnahan*, holding that whether "statutory requirements for a validly enacted law [were] followed" is such an important issue that it may be reviewed even thought the measure had already been adopted by a vote of the people. 282 S.W.3d 9, 16-17 (Mo. App. 2009). Two of those important legislative safeguards are the requirement that the Secretary of State provide a summary of the proposed initiatives and that courts review that summary statement. §§ 116.334 and 116.190. RSMo.

In considering these safeguards, courts balance the interests of proponents (here, Intervenor MRL) in placing their desired change on the ballot against the rights of the opponents in seeing that the change is not on the ballot unless the citizens make an informed decision to place it there. *Buchanan*, 615 S.W.2d at 11. Intervenors urge this court to place a foot on the scales that balance those interests and abandon the procedural safeguards in favor of a wide and smooth road straight

to a popular vote, regardless of whether those signing the initiative understand its effects. *See* Shull Br. 35. MRL not so subtly urges this court to apply an added standard to review of the statutes and consider the effect it might have on their efforts.[11] MRL Br. 60. Although they do not challenge the role of the Secretary of State or Auditor in the initiative process, they claim they "relied on" these officials and that affirming the trial court would "frustrate constitutional objectives." MRL Br. 59. To amend the law by initiative petition, "proponent must comply with the amending process prescribed in our Constitution and laws. It is not enough to say that the people have the right" to change the law by initiative. *Buchanan*, 615. S.W.2d at 18 (Rendlen, J., dissenting). The Court should ignore MRL's histrionics and reject any back door argument that the statute governing her involvement is unconstitutional. No one has challenged the procedural safeguards of §§116.334 and 116.190. The sole issue is how to interpret them and apply them in this case. Ultimately, the analysis of these statutes is no different than any other analysis the Court performs.

[11] MRL and Shull insert non-record information into their briefs. MRL purports to state the number of signatures submitted to the Secretary and even claims that "clergy" gathered them. MRL Br. 60. None of this is in the record and it is not proper argument to this Court because it has absolutely nothing to do with the plain language of the statutes or the evidence below.

1. The Secretary Has an Obligation To Summarize the Initiative Petition

To pass laws by the initiative, the Constitution requires proponents to obtain a certain number of signatures and to submit those to the Secretary. Mo. Const. Article III, section 50. The statutory procedure for submitting those signatures requires the proponents to submit signature pages in a certain form that must be approved by the Secretary in advance of circulation. § 116.180. In addition, the Secretary must review the initiative petition and summarize it. § 116.334. The legislature attached such importance to the summary that it must be placed on each signature page, and signatures will not be counted unless the summary appears on each page in the mandated location. § 116.120.

Because of these statutes, anyone considering whether to sign an initiative petition will see the official ballot title, consisting of the Secretary's short summary of the initiative together with a fiscal impact summary provided by the Auditor. This information is printed on the signature page directly above the signature lines so that voters can read about the initiative before signing. Jt. Ex. 1. The "official ballot title," which includes the secretary's summary and the auditor's fiscal note summary, are offered to the voter as an explanation of the petition's effect. The summary's important is self-evident: it provides citizens a quick and impartial way decide whether they want the measure on the ballot. If the Secretary or Auditor fail in their required duties, voters considering whether to

sign do so with incorrect or improper information. Here, the trial court found that the official ballot title would mislead potential signers. L.F. 208

2. Citizens Have the Right To Petition the Courts for Review of the Secretary's Summary Statement

In addition to the summary, the legislature established another safeguard – judicial review. The Secretary's summary statement must be 100 words or less and neither "argumentative" nor "likely to create prejudice for or against the proposed measure." § 116.334. The statutory scheme allows the Secretary's summary to be reviewed by the Courts upon petition of "any citizen who wishes to challenge" the statement regardless of whether they support or oppose the initiative. § 116.190. The Court decides whether the summary is "insufficient or unfair." *Id.* This important protection ensures that opponents or even those citizens merely interested in a "fair fight" have sufficient opportunity to challenge the summary that petition signers will see. *Overfelt v. McCaskill,* 81 S.W.3d 732, n.3 (Mo. App. 2002). It also allows proponents to obtain a fair and sufficient statement if they believe the Secretary or Auditor have failed in their duty.

B. The Sufficiency and Fairness Requirement in Section 116.190

Words in a statute are interpreted using their plain and ordinary meaning. *Utility Serv. Co., Inc. v. Department of Labor and Indus. Relations*, 331 S.W.3d 654, 658 (Mo. banc 2011). A "summary" statement must be a "short restatement of the main points." Webster's Third New International Dictionary 2289 (2002). A thing is "insufficient" if it is "inadequate to some designated need or purpose."

Id. at 1172. Since a summary is to "restate the main points," a summary statement is insufficient if it does not adequately restate the main points of the initiative. The Court of Appeals has used a slightly different, but totally consistent definition of insufficient: "Insufficient means 'inadequate; especially lacking adequate power, capacity, or competence.'" *Missourians Against Human Cloning*, 190 S.W.3d 451, 456 (Mo. App. 2006) (quoting *Hancock v. Secretary of State*, 885 S.W.2d 42, 49 (Mo. App. 1994)). This plain language approach to the statute is exactly the approach used by the trial court. L.F. 204-205.

A close review of the statutory language makes clear that the Secretary's obligation in preparing her summary statement is twofold. § 116.334. First, the Secretary must provide a summary. *Id.* Second, it must be in language that is neutral. *Id.* The two-part analysis is clearly reflected in section 116.190's discussion of the factors the court should consider when a challenge has been brought. A challenge may be brought if any citizen considers the statement "insufficient" *or* "unfair." § 116.190 RSMo. *Either* insufficiency or unfairness, or both, justify a new ballot title.

The Court of Appeals has acknowledged that the Secretary performs no great feat when she simply meets the first part of the test by avoiding outright deception. Instead, the statutes place an additional obligation on her: "[i]t is incumbent upon the Secretary in the initiative process to promote an informed understanding of the probable effect of the proposed amendment." *Cures Without Cloning v. Pund*, 259 S.W.3d 76, 82 (Mo. App. 2008)(citing *Buchanan*, 615

S.W.2d at 11). This obligation arises from the simple meaning of the word "summary," as discussed above. For that reason, accuracy alone is not the full test; rather, the summary must "accurately reflect[] *the legal and probable effects of the initiative*." *Missouri Municipal League v. Carnahan*, 303 S.W.3d 573, 584 (Mo. App. 2010)("*MML I*"). This reflects the mandate of *Buchanan* that procedural safeguards such as sections 116.334 and 116.190 must promote an informed understanding of the initiative. To be sufficient, the summary must indeed have "adequate power, capacity, [and] competence.'" *Missourians Against Human Cloning*, 190 S.W.3d at 456.

Prior case law does not address the specific situation the Court faces here – failure to adequately, with power and capacity, summarize the main points of the initiative. Certainly cases have held that the Secretary need not elaborate every detail. *Id*. The statutes require no great specificity, but they do require an adequate summary. Since there is no dispute that a summary must include the main points, the first issue is not whether the language was deceptive or could have provided more detail (it certainly could have, as it consumed less than half the word limit). Instead, the inquiry is whether the summary adequately and with sufficient power contains the main points of the initiative.

C. The Trial Court Found the Summary To Be Insufficient as a Matter "of Law and Fact."

The trial court found that the "very meaning and purpose" of the initiative was the 36% interest limit. L.F. 205. As a matter of "law and fact" the probable

effect of the initiative is "not tied to the mere *existence* of a 'limit' but rather, it depends on *what* the 'limit' is. *Id.* The trial court reached this decision after considering evidence of the language of the initiative itself, testimony from expert witnesses and from the Auditor's office about what the effect of the initiative would be.

1. There was Ample Support for the Finding of Insufficiency

The Court's finding of insufficiency due to the Secretary's failure to advise voters the interest rate would be changed to 36% was well supported by the evidence. The initiative itself declares the 36% limit to be the purpose of the initiative. Section 408.100 of the initiative advises "it is the intent" of the initiative to "reduce the annual percentage rate for payday, title installment and other high cost consumer credit and small loans from triple digit Interest rates to thirty six percent per year." L.F. 28. The initiative claims that rates without the new law are "as high as three hundred percent annually" prior to imposing the thirty six percent limit, making clear that a reduction to a set amount is the goal and that the effect of the initiative is to lower the rate to a set amount. *Id.* The proponent and submitter of the initiative to the Secretary summarized his own initiative. His proposed summary for the Secretary identified the important points of the initiative, the first of which was that it would "reduce" the interest rate "to 36%." L.F. 239.

Dr. Joseph Haslag, a professor of economics at the University of Missouri, testified at trial and told the Court that without knowing the interest rate amount,

there would be no way to analyze what effect the initiative would have on costs or savings to the State. 3/27/12 Tr. 154. The State Auditor's office agreed by way of testimony from the official who prepared the fiscal note and fiscal note summary.

The fiscal note summary prepared by the Auditor (which appears on the Official Ballot Title just below the Secretary's Summary) depended on the interest rate being 36% as opposed to some other number. 3/27/12 Tr. 34-35. The trial court had the benefit of hearing testimony about the real impact of the initiative when it concluded "as a matter of both law and fact" that the "probable effect" of the initiative depends on "what the 'limit' is." L.F. 205. Defendants offered no evidence that would support a contrary finding. The trial court's factual determination should not be disturbed unless it is against the weight of the evidence or there is not substantial evidence to support it. *Murphy v. Carron,* 536 S.W.2d 30, 32 (Mo. 1976). In this case, all of the evidence supports the trial court finding that the main point of the initiative was the reduction to 36%.

Of course the trial court was right that the interest rate is a critical factor in deciding whether this initiative should be placed on the ballot. When one is asked to agree to an interest rate, the most important factor is what the rate is. The trial court pointed out this logic by briefly referencing state and federal statutes as well as the common law's treatment of interest as a material term in any contract. L.F. 205. This was the trial court's way of elaborating upon his own factual finding, but it takes no more than common sense to find that a person considering whether to sign an initiative to place an interest rate cap on the ballot would want to know

the actual rate. While a cap of 300% would seem outrageous to some, a cap of 3% would seem paltry to others. Similarly, knowing that the cap is 36% is a critical piece of information which is material and undoubtedly a "main point" of the initiative. The trial court's reference to the common law is particularly insightful. In essence, the Secretary of State has omitted a material term from the summary such that there cannot be a meeting of the minds without knowing what the interest rate is. *See Wigley v. Capital bank of Southwest Missouri*, 887 S.W.2d 715, 724 (Mo.App. 1994).

2. The Trial Court Found the Summary To Be Unfair

For this reason, the court also found that "without an explicit statement of the limit, the Summary is misleading and likely to deceive petition signers and voters." The phrase "unfair" in 116.190 must also be interpreted using the plain and ordinary meaning as found in the dictionary. If the Summary is "unfair" it is guilty of "providing an insufficient *or* inequitable basis for judgment or evaluation." Webster's Third New International Dictionary 2495 (2002) (emphasis supplied). Prior jurisprudence acknowledges that a summary statement which is insufficient is also unfair within the plain meaning of those terms. In *Cures Without Cloning v. Carnahan*, the Court of Appeals upheld the re-writing of a Summary statement, without discussing whether the language was argumentative and likely to create prejudice. Instead, the Court found that a summary was insufficient and unfair because it "does not fairly summarize any goal or effect of the initiative proposal." 259 S.W.3d at 82.

The *Cures* holding is consistent with the ordinary meaning of the words in the statute – failing to summarize makes the summary both insufficient *and* unfair. The holding in *Missouri Municipal League* also takes this approach. A summary of an initiative to change the eminent domain laws required Court intervention and a new summary statement because the summary must "accurately reflect[] the legal and probable effects of the initiative." *Mo. Municipal League*, 303 S.W.3d at 584. "To be fair and impartial, the summary should describe [the] changes" made by the initiative." *Id. at 586.* The *MML I* Court did not trouble itself with distinguishing between the words insufficient and unfair in this context, because a summary that fails to do so fails both tests.

3. The Trial Court Correctly Used the Word, "Allow"

The Court also changed the Secretary's use of the word "limit" concerning interest rates to "allow." The State's appeal seems to abandon this issue, arguing only that the summary was "true" even if it did not contain the interest rate limitation without discussing the other change from "limit" to "allow." MRL does not raise the issue specifically in a Point Relied on, including it only as a subpart of his argument. MRL Br. 58.

The trial court was correct to make this change because the Secretary's summary told potential signers that the measure would limit interest rates to some unspecified amount. The use of the term "limit" was misleading and inaccurate. By stating that the measure will amend the law "to limit the annual rate of interest, fees and finance charges" the Secretary effectively told voters that under current

law, there is no limit on the annual rate of interest, fees and finance charges for loans covered by the measure. This inaccuracy was aggravated by the failure to disclose the new interest rate would be 36%. A fair reading of the language is that the law will be changed to impose a limit of some amount where none previously existed.

This is simply untrue and therefore misleading. Section 408.140, RSMo, places significant restrictions on the fees and charges consumer loan companies can charge. These restrictions include the prohibition of any fee or charge not specifically authorized by statute and a cap on the amount of origination, extension and late fees that a consumer lender may charge. By stating that the Initiative Petition would "amend" Missouri law to "limit" the annual rate of interest, fees and finance charges that may be charged for consumer loans, the summary statement unfairly misleads petition signers and voters that such limits do not currently exist and that the initiative is necessary to impose *any* limit.

Misrepresenting to potential petition signers the effect a measure will have when compared with existing law is inadequate and inequitable because it does not inform readers of the probable legal effects of the measure. The issue was squarely addressed by the Court of Appeals in *MML I*, 303 S.W.3d 573. There the Court affirmed the trial court's decision to rewrite a portion of a summary statement because the summary statement incorrectly told potential signers that the initiative would establish a requirement for just compensation upon a taking of property when such a requirement already existed in the law. *Id.* at 588. Without

commenting on whether this inaccuracy made the summary "insufficient" or "unfair" or both, the Court of Appeals modified the trial court's summary revision as well as the Secretary of State's original language. *Id.* Just as it was insufficient and unfair to say that the initiative in *MML* required landowners to receive just compensation because the law already mandated just compensation, it is insufficient and unfair to tell signers this initiative limits fees and finance charges, when the law already imposes such limitations.

D. Notice Is Not the Standard

Ignoring the language of the statute, the State's brief takes the position that the summary statement must only give notice of the subject of the law. State Br. 25. MRL's brief elaborates on this concept by urging this court to look to clear title cases for guidance. MRL Br. 49-50. MRL further claims it is sufficient for the Secretary to give notice and then to have "individuals . . . look to the proposed law itself for greater detail about the proposed law's precise provisions." MRL Br. 49. This "notice" standard cannot be found in the statutes or in any reasonable interpretation of the words used. Had the legislature meant the Secretary to give "notice," the statute could use that phrase. Instead the statute requires a summary of the measure in up to one hundred words. This Court's holding in *Buchanan* points out that the point of such a safeguard is to promote an informed understanding of the initiative and its probable effects, not simply to give notice and hope citizens can figure it out.

Clear title cases interpret a constitutional provision, not the statutes at issue here. MRL borrows from those cases and asks that the Secretary's one hundred word summary statement only be required to "indicate in a general way" the type of initiative enacted. *Id.* MRL urges that "an official ballot title has never been intended to serve as the key source of information for citizens" concerning the initiative. MRL Br. 55. MRL cites to no statute or case as authority for this proposition, because there is none. Instead, the statutory requirement that the Secretary summarize the initiative, that the Auditor comment on its fiscal impact and that this information be placed on each and every signature page in a prominent place where signers will review it leads to the opposite conclusion. The official ballot title is not only *intended* to be an important source of information, but as a practical matter it is.

MRL next analogizes its proposed "notice" standard to that of candidate elections. Candidates are listed on the ballot solely by name and party and beyond this, MRL says, citizens must educate themselves. MRL Br. 55. Of course, the statutes do require the Secretary of State to provide more about the candidate, such as an address and the party to which she belongs. § 115.401 RSMo. Allowing the Secretary to ignore the statutory requirement that she summarize an initiative petition would be no different than allowing her to print a list of candidates without party identification or, more analogous to this case, allowing her to print only part of the name of a candidate, listing "Mr. Kinder" as a candidate for Lt.

Governor without telling voters whether the candidate is Byron Kinder or Peter Kinder.

Certainly, lower court cases mention the "notice" concept in the initiative petition summary statement context, notably *Bergman v. Mills*, 988 S.W.2d 84, 92 (Mo. App. 1999). But these cases, and Appellant's briefs, all trace back to *Union Electric v. Kirkpatrick*, 678 S.W.2d 402 (Mo. banc 1984) and *Union Electric v. Kirkpatrick*, 606 S.W.2d 658 (Mo. banc 1980). The *Union Electric* cases were not challenges to the procedural requirements of the legislature. Rather, they challenged the Constitutional requirements concerning a single subject being expressed in a title. Those cases predate these statutes and analyze a completely different standard, but nevertheless continue to be cited in cases and in the State's briefs. *See* State Br. 24. The legislature did not direct the Secretary to simply provide notice of the subject of the initiative and direct the voters to the initiative itself. Rather, the statute requires a summary that is both sufficient and fair.

VII. THE TRIAL COURT DID NOT ERR IN CERTIFYING THE COURT-WRITTEN SUMMARY STATEMENT PORTION OF THE OFFICIAL BALLOT TITLE TO THE SECRETARY OF STATE (RESPONDS TO STATE'S BRIEF POINT II)

A. Separation of powers

Missouri Constitution Article II, section 1 provides:

> The powers of government shall be divided into three distinct departments--the legislative, executive and judicial--each of which

> shall be confided to a separate magistracy, and no person, or collection of persons, charged with the exercise of powers properly belonging to one of those departments, shall exercise any power properly belonging to either of the others, except in the instances in this constitution expressly directed or permitted.

"This language seems restrictive but in practical application has always been liberally construed. The word 'properly' is taken as meaning solely or exclusively." *Clark v. Austin*, 101 S.W.2d 977, 987 (Mo. banc 1937). "In practice, the functional lines between . . . political departments are not hard, impenetrable ones. There is a necessary overlap between the functions of the departments of government." *State Auditor v. Joint Comm. on Legislative Research*, 956 S.W.2d 228, 231 (Mo. banc 1997). Violation of separation of powers can occur in two ways: (1) when one branch interferes impermissibly with the other's performance of its *constitutionally assigned power*; or (2) when one branch assumes a power that more properly is entrusted to another. *Id.*

Neither of these types of violation has occurred here. The authority to write a summary statement is not a duty imposed on the Secretary by the Constitution, so no violation can occur under the first type. Nor has there been a violation of the second type because the judiciary is only rewriting that portion of the summary statement that was in excess of any discretionary authority granted to the Secretary by statute. This Court must deny the State's Point II.

B. The Secretary's Authority To Write Summary Statements for Initiative Petitions Is Not Assigned By the Constitution

The Secretary seems to suggest that her authority to write summary statements is found in the Constitution, yet she cites no provision imposing that duty upon her.[12] This is because no such provision exists. In fact, the Secretary is mentioned only twice in the various constitutional provisions relating to initiative petitions. Article III, section 50 states that initiative petitions proposing amendments to the constitution or proposing laws must be filed with the Secretary not less than six months before the election. This section does not even state what the Secretary does once such petitions are filed with her. The only other provision mentioning the Secretary is Article III, section 53, which states:

> The total vote for governor at the general election last preceding the filing of any initiative or referendum petition shall be used to determine the number of legal voters necessary to sign the petition. In submitting the same to the people the secretary of state and all other officers shall be governed by general laws.

[12] State Br. 27-35. The Secretary includes in her list of constitutional provisions Article XII, section 2(b), a provision that not only fails to mention the Secretary, but also only applies to amendments to the constitution. State Br. 29. This case addresses a petition to enact/amend statutes.

This provision implies that the Secretary has some role in submitting initiative petitions to the voters, but that is governed by statutes. Even turning to Article IV, section 14:

> The secretary of state shall be custodian of the seal of the state, and authenticate therewith all official acts of the governor except the approval of laws. . . . [The Secretary] shall keep a register of the official acts of the governor, attest them when necessary, and when required shall lay copies thereof, and of all papers relative thereto, before either house of the general assembly. [The Secretary] shall be custodian of such records, and documents and perform such duties in relation thereto, *and in relation to elections and corporations, as provided by law*, but no duty shall be imposed on him by law which is not related to his duties as prescribed in this constitution.

(Emphasis supplied). Contrary to the Secretary's assertion in her brief that this provision makes her "chief elections officer of the state" (State Br. 33), the Secretary's "election" authority is as provided by law. This provision allows the legislature to impose duties upon her related to elections, but it does not give her any duties regarding summary statements for initiative petitions. That simply is not in the language. The first type of separation of powers violation simply cannot exist as regards a court's rewriting of the summary statement because the duty is not assigned to the Secretary by the constitution.

C. The Authority for the Secretary To Prepare Summary Statements for Initiative Petitions Is Granted By Statute

Section 116.334.1 states in pertinent part:

> If the petition form is approved, the secretary of state shall within ten days prepare and transmit to the attorney general a summary statement of the measure which shall be a concise statement not exceeding one hundred words. This statement shall be in the form of a question using language neither intentionally argumentative nor likely to create prejudice either for or against the proposed measure.

No one disputes that the Secretary's summary statement must be neither "insufficient nor unfair." § 116.190. As such, the power conferred by the legislature is to write a summary statement that is not intentionally argumentative, not prejudicial, not insufficient and not unfair. As long as the Secretary exercises any discretion given to her in exercising this power within these parameters, there is no other branch of government that interferes. It is only when she has been determined by a court to have exceeded her power,[13] and to have written a summary statement that is, as in this case, insufficient and unfair, that the legislature has authorized the judiciary to rewrite the summary statement.

[13] The Secretary does not dispute that a court can make this determination. State Br. 27-34.

D. The Limitations On the Trial Court's Authority To "Rewrite" the Summary Statement As Set Forth in Court of Appeals Cases Remedies Any Possible Encroachment Upon the Secretary's Power

If anything in section 116.190 can be interpreted to encroach upon the Secretary's powers (assuming, *arguendo*, they are vested solely in her), it might be if the trial court completely rewrote the entire summary statement after finding it insufficient or unfair – if it went beyond correcting the summary statement and chose its own wording even where the Secretary had used sufficient and fair language. To the extent this may be a violation of separation of powers, the Court of Appeals has already remedied such a problem through its rulings.

Cures Without Cloning v. Pund, 259 S.W.3d 76 (Mo. App. 2008) acknowledges and protects the Secretary's role by making it abundantly clear that a trial court does not have the authority to completely rewrite a summary statement; it can only modify the original summary statement to the extent necessary to correct the verbiage that makes it insufficient or unfair. *Id.* at 83. *Missouri Munic. League v. Carnahan*, 303 S.W.3d 5 (Mo. App. 2010), also stayed within these parameters, rewriting the summary statements only to correct the insufficiency or unfairness and going no further. As such, the Court of Appeals has interpreted the trial court's authority in section 116.190 to be limited to rewriting the portion of the summary statement where the Secretary of State was determined to have exceeded her authority and thus any discretion that may be placed with her. Such an interpretation is consistent with the statutory language

while also protecting the discretion of the Secretary – so long as she exercises it properly.

The statutes do not give the Secretary the discretion to write an insufficient or unfair summary statement. She would exceed her authority in doing so and any discretion she is given is limited to the parameters of writing a summary statement that is not insufficient, unfair, or prejudicial. A court in no way invades any discretion placed in her when it corrects verbiage that exceeds the authority she is given. As such, the complaint lodged by the Secretary, to the extent it has any merit, has already been remedied by the ruling in *Cures* that has been followed since, and is followed by the trial court. If *Cures* is ratified by this Court, then the authority granted a court by section 116.190 does not violate the separation of powers, to the extent the power to write an initiative petition summary statement *is* solely entrusted to the Secretary by statute. The power given to the Secretary is limited by the language of the statutes and if she exceeds that power by drafting a summary statement that is insufficient or unfair, the judiciary is not encroaching upon the Secretary's power by rewriting a summary statement that leaves intact that which is sufficient and fair and only changing it as necessary to correct the insufficient or unfair parts.

E. The Secretary's Argument Fails

As already set forth, a court rewriting only that portion necessary to cure the insufficiency or unfairness does not encroach upon any authority of the Secretary. The Secretary has exceeded her authority when she writes an

insufficient or unfair summary statement and therefore the court's limited rewrite as under *Cures* cannot encroach upon her powers when that limited rewrite is to cure her acting in excess of her powers, not within them. This Court need only find that to the extent the separation of powers provision could apply to the Secretary's writing of a summary statement for an initiative petition, it would not be encroached upon by section 116.190 based upon the limited rewriting allowed in *Cures*, followed here by the trial court. The Secretary's Point II must be denied.

VIII. THE SUMMARY STATEMENT LITIGATION DOES NOT IMPACT MRL's CONSTITUTIONAL RIGHTS, AND MRL's ARGUMENTS ARE UNRIPE AND UNDEVELOPED (RESPONDS TO MRL's II.E)

Finally, almost as an afterthought, MRL claims that the judgment cannot stand because it "burdens" their constitutional right to engage in the petition process. MRL Br. 59-60. This claim is meritless, but this Court need (and should) not reach the merits because it is unripe: the validity of MRL's signatures is not at issue here, and will not be at issue until the Secretary of State certifies the number of valid signatures.

A lawsuit under Section 116.190, RSMo merely decides whether the summary statement, fiscal note, and fiscal note summary are "sufficient" and "fair." If they are not, the trial court either certifies a new, corrected summary statement, or remands the fiscal note and fiscal note summary to the Auditor for a second try. § 116.190.4, RSMo. There is no ruling on the validity of signatures,

as all parties and the trial court acknowledged in the Second Amended Judgment: "The Court recognizes that those portions of Plaintiffs' prayers for relief seeking invalidation of signatures were withdrawn and were not tried." L.F. 209.

In Section 116.200, the General Assembly has provided a separate statutory proceeding for the type of issue MRL has belatedly raised, the validity of their signatures. But first, the Secretary has several tasks to complete. Under Section 116.120, RSMo, after a petition is submitted, the Secretary of State is to "examine the petition to determine whether it complies with the Constitution of Missouri and with this chapter." § 116.120.1, RSMo. Among other things, the Secretary has authority not to count signatures "which are, in his opinion, forged or fraudulent signatures." § 116.140, RSMo. The Secretary then issues a "certificate of sufficiency" or, if it is insufficient, "shall issue a certificate stating the reason for the insufficiency." § 116.150, RSMo. The Secretary must issue the appropriate certificate no later than the thirteenth Tuesday before the general election. § 116.150.3, RSMo. The Section 116.200 challenge to the Secretary's "sufficiency" determination can be filed by "any citizen" in the Cole County Circuit Court "within ten days after certification is made," and the challenge must be decided "as quickly as possible." § 116.200.2, RSMo.

Therefore, if any decision regarding the official ballot title will injure MRL, several contingencies must occur. First, MRL must turn out to have submitted a sufficient number of otherwise-valid signatures—something that no one will know until MRL's signatures are verified, counted, and certified by the Secretary of

State under the above-cited statutes. Second, the Secretary of State must make a determination that some or all of MRL's signatures are invalid because the ballot title was adjudicated insufficient and unfair, and this determination must have rendered insufficient an otherwise-sufficient petition. Again, no one has any idea whether this will occur. If it does, the legislature has provided a clear statutory remedy and timeline: a Section 116.200 proceeding, which can be brought by any citizen within ten days of the Secretary's decision. Accordingly, MRL's constitutional argument is unripe.

There are other reasons not to consider MRL's challenge. First, if it is an as-applied challenge to the application of Section 116.190, RSMo to them, MRL has developed no record as to their own "injury." They summarily claim without any citation to record evidence that they "relied" on the Secretary of State to draft an adequate summary statement in September 2011, but then admit that she drafted a title other than the one they submitted, and that in the several months between the time of her action and the time they began to use it to circulate signatures, they took no action—as was their right—to challenge it. MRL Br. 59-60. There is no evidence of the amount or timing of the alleged "time, effort, and expense put in by Rev. Bryan" or anyone else, nor is there evidence about whether this was justified given MRL's early notice that the Secretary had drafted language that lacked any reference to the "36%" cap MRL claims is so central to their petition (and asked for in their own proposed summary). Before this Court even begins to consider whether MRL has stated the kind of claim for injury that might

be redressable under the Missouri Constitution, these and other facts would have to be developed and tried in the first instance. In this case, they have not been tried or presented to anyone, and exist merely as free-floating, unsupported assertions in appellate briefing.

For all of these reasons, this Court should not consider Intervenor-Appellant MRL's belated effort to sketch a constitutional claim.

IX. THE TRIAL COURT CORRECTLY EXERCISED ITS DISCRETION IN DENYING SHULL AND STOCKMAN PERMISSIVE INTERVENTION (RESPONDS TO BRIEF OF SHULL AND STOCKMAN)

This is the fifth bite at the apple for Appellants Shull and Stockman (collectively, "Shull"). From their initial motion to intervene, through discovery, through the hearing at which the trial court denied them intervention, and through the now-final decision of the Court of Appeals which they left undisturbed, they were unable to establish a "unique personal interest" or even a "unique argument" that they would make in this Section 116.190 case. Now, with the exception of a few rhetorical embellishments, Shull largely repeats the arguments they made in their unsuccessful attempt to intervene as of right—even to the extent that

significant parts of their brief appear to have been lifted verbatim from their briefs in the Court of Appeals.[14]

The only new materials in Shull's brief are improper citations to newspapers and an increasingly desperate resort to political argument[15] about the petitions' merits. Especially in light of Shull's briefing,[16] the circuit court did not abuse its discretion and acted wisely in denying permissive intervention.

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[14] *See, e.g.*, footnote 2 at pages 16-17 of Shull's brief. The footnote explains how "Appellants' counsel" took several months to learn of two lawsuits related to the petition. While this footnote was accurate several months ago when it appeared in Shull's Court of Appeals brief when they were represented by Ms. Heidi Vollet, "Appellants" changed counsel at the onset of briefing. *See* L.F. 1-9. Ms. Vollet no longer appears on their briefs and represents two new intervenors who are the actual proponents of the petition, while new attorneys entered their appearance for Shull. Nonetheless, new counsel did not change the footnote at all—a very minor error, but another indication that Shull is simply cutting and pasting their old "intervention of right" arguments and labeling them "permissive intervention."

[15] Both sets of citations are the subject of a separate motion to strike.

[16] Without citing the record or legal authority, Shull labels the underlying lawsuits as "frivolous," intended to "subvert the will of the People of Missouri," a "manipulation of wealth," and an attempt to "manipulate the judiciary." Shull Br. 36. The allegation that a claim or defense is "frivolous" is serious. Mo. R. Civ. P.

A. The Standard of Review Is Abuse of Discretion

The standard of review is abuse of discretion:

> This Court must confine its review of permissive intervention under Rule 52.12(b) to considering whether the trial court's ruling was an abuse of discretion because it was "clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration." *State ex rel. Nixon v. Am. Tobacco Co.*, 34 S.W.3d 122, 131 (Mo. banc 2000).

Johnson v. State, SC92351, 2012 WL 1921640 at *6 (Mo. May 25, 2012).

55.03(c)(2); Mo. R. Prof. Conduct 4-3.1 ("Meritorious Claims and Contentions"). The same is true of allegations regarding "manipulation" of a Missouri court. Mo. R. Prof. Conduct 4-3.5 ("Impartiality and Decorum of the Tribunal"). This Court can reasonably conclude that such arguments are indicative of the sort of contributions Shull would have made below.

B. The Trial Court Focused on the Most Important Consideration and, as the Court of Appeals Held in a Final Decision that Appellants Left Undisturbed, Correctly Found that Appellants' Interest Was Not Implicated in this Section 116.190 Challenge

1. Permissive Intervention Requires Appellants to Have a Unique Claim of Defense, or at the Very Least, a Unique Interest

Under Rule 52.12(b), Shull's permissive intervention could only have come within the trial court's discretionary authority if their "claim or defense and the main action [had] a question of law or fact in common." Mo. R. Civ. P. 52.12(b). But before the court's exercise of discretion even becomes relevant, there is a threshold issue: the existence of a prerequisite claim, defense, or interest under Rule 52.12(b)(2). As Shull now admits, they were at least required to show that they had a "claim, defense, or interest unique to themselves." Shull Br. 29 (quoting *Comm. for Educ. Equality v. State ("CEC")*, 294 S.W.3d 477, 487 (Mo. banc 2009)). Permissive intervention "is inapplicable" where intervenors would "merely reassert[] the State's defenses." *CEC*, 294 S.W.3d at 487.

It is undisputed that Shull had no unique "claim" or "defense." Shull has never pled a unique claim or defense (*Compare* Shull and Stockman's Answer, L.F. 78-82, to Answer of Carnahan, L.F. 83-89, and Answer of Schweich, L.F. 90-96, which are more thorough and assert additional defenses neglected by Shull and Stockman). Instead, Shull has placed all their eggs in one basket: their allegedly

"unique interest" in the validity of their own signatures and the qualification of the petition for the ballot, which, in turn, they believe gives them a unique interest in the outcome of Mr. Prentzler's challenge to the official ballot title as "insufficient" and "unfair." Shull Br. 30.

This Court recently made clear that if the facts indicate to the trial court that a "unique interest" exists, it merely permits—it does not require—the trial court to grant permissive intervention:

> Proposed intervenors are not entitled to permissive intervention if they simply will reassert the same defenses, but intervention can be appropriate when the intervenors can show "interest *unique* to themselves." *See id.* (emphasis added). Moreover, "[p]ermissive intervention may be permitted when the intervenor has an economic interest in the outcome of the suit." *Meyer v. Meyer*, 842 S.W.2d 184, 188 (Mo.App.1992) (internal quotations omitted); *see also Matter of Additional Magistrates for St. Louis Cnty.*, 580 S.W.2d 288, 295 n. 6 (Mo. banc 1979) (noting that a party properly could have been permitted to intervene where its economic interests were at issue).

Johnson, SC92351, 2012 WL 1921640 at *6 (finding no abuse of discretion where the trial court could have concluded based on the facts that legislators had a personal interest in their own districts). As discussed below, Shull did not even meet the baseline criteria for calling upon the trial court's discretion: they admitted

that they "simply [would] reassert the same defenses," and the Court of Appeals issued a final and binding decision—consistent with the law and with common sense—that their alleged personal interest in their signatures was not sufficient to gain entry to this limited-purpose Section 116.190 proceeding.

2. A Final and Binding Decision of the Court of Appeals Held that Shull Has No Unique Interest in this Section 116.190 Challenge, and Common Sense Supports this Result

a. Collateral Estoppel Bars the Shull Appellants' Attempt to Resurrect the Same "Personal Interest" Argument Previously Rejected by the Court of Appeals in a Final and Binding Decision

Although Shull admits that, barring any unique claim or defense, their permissive intervention argument hangs by the thread of "unique personal interest," the Court of Appeals finally and definitively severed that thread in its March 26, 2012, opinion. *See Prentzler v. Carnahan*, __S.W.3d__ 2012 WL 985839 (Mo. App. W.D. Mar. 26, 2012) (no transfer or rehearing applied for or taken); *see also* L.F. 132.

Because that decision is final, collateral estoppel bars the relitigation of Shull' "unique interest" under the "permissive intervention" heading. *See James v. Paul*, 49 S.W.3d 678 (Mo. banc 2001) (collateral estoppel applies where the issue decided in the prior litigation was identical, there was a judgment on the merits, the parties are the same or in privity, and there was a full and fair

opportunity to litigate the issue); *Sexton v. Jenkins & Assocs., Inc.*, 152 S.W.3d 270, 273-274 (Mo. banc 2004) (even where a petition was dismissed without prejudice, the trial court's implicit finding that it lacked subject matter jurisdiction, affirmed by the court of appeals in a final decision, precluded appellants from arguing jurisdiction-related issues and constitutional challenge in a second suit they filed in the circuit court to plead around the jurisdictional problem identified in the first appellate decision, and the Supreme Court dismissed the case on preclusion grounds after taking jurisdiction based on the constitutional issue).

The elements of collateral estoppel are easily met here. The parties in *Prentzler v. Carnahan* were identical to those here (and were even represented by the same counsel until new attorneys entered their appearance for Shull just before the filing of briefs); the Court of Appeals' decision was on the merits and a mandate issued; and no motion for transfer or for reconsideration was filed. As discussed below, even though the Court of Appeals was considering "of right" instead of permissive intervention, the precise issue upon which it rested its decision was Shull's claimed "personal interest" as signatories and supporters in Section 116.190 litigation over the ballot title's sufficiency and fairness.

The Court of Appeals recognized Shull's argument—identical to the one they assert here—that "as signatories and supporters of the Consumer Credit Initiative Petition, they have a personal interest in the validity of the initiative petition, in seeing [it] circulated and qualified for the November 2012 ballot, and in having their signatures counted as valid." *Prentzler*, 2012 WL 985389 *3.

Compare Shull Br. 30 (using almost identical language to describe their "personal interest"). Yet the Court of Appeals clearly rejected this argument, holding that "Appellants have failed to establish that, as mere supporters and signatories of an initiative petition, they have a sufficient interest in the underlying § 116.190 actions." *Id*. The Court noted that Section 116.190 actions have a limited purpose, and that accordingly, "Appellants' proposed interests in having their signatures count and qualifying the initiative for the ballot are not at issue in the underlying litigation." *Id*. at *3-4.

Further, echoing a failure in Shull's prior and current arguments (which were identical), the Court noted that:

> Appellants have failed to show any such immediate or direct claim in the underlying Industry Suits, as they have not established how the outcome of those cases will cause them to incur any legal liability or directly affect their legal rights as supporters of the Consumer Credit Initiative Petition. Thus, it becomes inconsequential whether the State defendants adequately represent the interests of Appellants, as they have failed to establish that they have a sufficient interest in the outcome of the underlying litigation by merely signing and supporting an initiative petition.

Id. at *5.

The Court concluded that "opening intervention of right to citizens solely because they have a differing political view as to the ballot initiative would open

the floodgates to oppressive intervention, and no public policy would be served. *Id*. at *6. The Court might have added that premising "interest" for intervention on a party's political position essentially invites that party to engage in political argument and rhetoric of the type that consistently infects Shull's briefing, and would likely have infected their conduct of litigation before the trial court, causing needless delay and burden on all of the parties and the court. At any rate, the Court of Appeals decided against Shull on the precise issue they raise again as a direct appeal. Shull's claim is barred by collateral estoppel.

b. The Trial Court's Exercise of Discretion and the Court of Appeals' Decision Are Both Consistent With the Law and With Common Sense

Shull wrongly charges the trial court with "arbitrary indifference" to their unique personal interests as signers and supporters of the petition. They have forgotten or ignored the fact that the trial court *actually recognized the existence of that interest* (a decision specifically noted and reversed by the Court of Appeals in its final and binding decision).

Instead, the trial court based its decision on Shull's open admission that they would not present any unique claim or defense and would instead argue for the precise version of the ballot title already being defended by the State defendants. Rather than being "arbitrary" and "illogical," this decision followed this Court's most recent statements of Missouri law, which are themselves cited without argument in Shull' brief. *See* Shull Br. 30; *Johnson*, SC92351, 2012 WL

1921640 at *6 ("Proposed intervenors are not entitled to permissive intervention if they simply will reassert the same defenses, but intervention can be appropriate when the intervenors can show 'interest *unique* to themselves'"); *CEC*, 294 S.W.3d at 487 (Permissive intervention "is inapplicable" where intervenors would "merely reassert[] the State's defenses.").

Most of Shull's argument is based upon their speculation that they would have prepared for trial and cross-examined witnesses more proficiently than the trial counsel for the Auditor and Secretary of State. Shull Br. 33-34. Indeed, as *amici*, Shull had every opportunity to make legal arguments (and actually proffered oral argument and briefing on all of the issues, both legal and factual, 3/27/12 Tr. 250-255), so their complaint can only be directed to the State Defendants' chosen method of contesting the evidence presented by the plaintiffs.

There are several problems with Shull's sole reliance on this particular aspect of the litigation to prove that the trial court's decision was "arbitrary." First, differing views of trial strategy—especially when presented as a form of Monday-morning quarterbacking—should be irrelevant to the permissive intervention analysis. Second, the issues related to the summary statement were legal issues, and as discussed above the Shull Appellants fully used their opportunity to orally argue and brief those issues before, during, and after the trial.

Third, Shull incorrectly suggests that plaintiffs' evidence would only have been effectively disputed through counter-evidence. But this is only one way of contesting facts:

> A factual issue is contested if disputed in any manner, including by contesting the evidence presented to prove that fact. *Id.* As enunciated in *White*, a party can contest the evidence in many ways, such as by putting forth contrary evidence, cross-examining a witness, challenging the credibility of a witness, pointing out inconsistencies in evidence, or arguing the meaning of the evidence. *Id.*

Pearson v. Koster, SC92317, 2012 WL 1926035 (Mo. banc May 25, 2012). Indeed, under the theory shared by all Appellants, no evidence was admissible to prove the sufficiency or fairness of the fiscal note or fiscal note summary other than the materials the Auditor had already received during his initial review of the petition. Clearly, the State believed that the most effective means of contesting the evidence was to honor this theory in its own trial presentation. The fact that the trial court ultimately disagreed that one portion of the Auditor's fiscal note and summary was "sufficient" does not establish that the State's counsel were ineffective or that they exhibited a "particularly appalling" lack of trial preparation.[17] Shull Br. 34.

Additionally, in a bout of briefing bravado, the Shull Appellants' new appellate counsel calls Plaintiffs' trial evidence "outrageous" and "absurd,"

[17] Shull makes surprising and unfounded editorial comments about the litigation skills of the State's counsel without any record citation. Shull Br. 34.

claiming that Shull would have "exposed" this by putting into evidence various facts about the effects of a 36% loan cap on lenders, borrowers, and associated fiscal impacts. Shull Br. 33-35. These Monday morning assurances of Shull's winning trial strategy are irrelevant now, because the relevant issue is what the trial court was presented on Shull's motion, not what Shull claims would have happened at trial. *State ex rel Nixon v. Am. Tobacco Co., Inc.*, 34 S.W.3d 122, 131 (Mo. banc 2000) (considering what evidence was "then before" the trial court when it exercised its discretion).

Shull presented none of these newly outlined defenses, factual showings, or points of proof to the trial court in their briefs or at the intervention hearing. 1/30/12 Tr. 12-17. Shull cannot suddenly inject new "facts" into the record by proposing lines of cross-examination or alternative evidence that would allegedly have effectively combated Prentzler's expert. Indeed, if the Court decides to open the record for Shull to speculate about factual arguments they would have presented to the trial court, it should consider that during the actual litigation in *Prentzler* when Shull was a party for several months, Shull consistently refused to disclose any plans to proffer such evidence in several months of discovery. *See* Prentzler's Motion to Dismiss, 3-7. Further, contrary to their claim that they would have diligently engaged in discovery, Shull refused over a period of several months to notice any depositions—even the deposition of Dr. Haslag, who had submitted the fiscal impact statement to the Auditor as an opponent of the initiative. L.F. 1-9 (Docket sheet in *Prentzler* covering a several-month period,

which shows Shull served no notice of deposition for Dr. Haslag even when trial was only weeks away).

Even more incredibly, Shull now claims that they would have submitted evidence that would have challenged the core assumptions of the fiscal note itself, arguing that a positive fiscal impact could be expected by capping rates at 36% and shutting down several lending industries. Shull Br. 33-35. The forum for such an argument was a Section 116.190 challenge. Shull actually filed such a challenge and used its existence as an excuse to intervene in the *Prentzler* case, arguing in their Motion to Intervene that the same facts would be tried in all of the cases. *See* L.F. 73-74. Then, safely admitted to the *Prentzler* case, Shull voluntarily dismissed their own timely-filed challenge. Rather than disclosing the "facts" they intended to prove at trial, Shull stonewalled in discovery, never told the circuit court what unique facts or defenses they would prove, never argued their allegedly unique facts or defenses in their failed appeal to the Court of Appeals, and raised their new theories about how the 36% interest rate would actually lead to a positive fiscal note for the first time in their Supreme Court brief.

Collateral estoppel, Missouri law on permissive intervention, and common sense all require that this Court deny Shull's try for yet another bite at the apple. The circuit court's exercise of discretion should be affirmed.

CONCLUSION

The initiative is an important right, but it is only meaningful where state officials perform their functions fairly and adequately. Each successive election cycle, it seems more apparent that state officials charged with these duties abhor, or perhaps disdain, their assignments. As the initiative becomes ever more central to our governance, Missouri cannot afford to have critical protections read out of the law. This Court should take a firm stand against the creeping deterioration of these protections that has been encouraged by recent Court of Appeals decisions. While the proponents' desire to attack lenders burns hot, the integrity of the process is more important than any political outcome this year. This Court should affirm.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the foregoing brief (a) contains the information required by Rule 55.03, (b) was prepared using Microsoft Word 2010 in Times New Roman size 13 font, and (c) complies with the word limitations of Rule 84.06(b) in that it contains 27,853 words.

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CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of June, 2012, the foregoing brief was filed electronically with the Clerk of the Court to be served by operation of the Court's electronic filing system on all counsel of record, and, in addition, was sent by electronic mail to the following:

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